TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 301

EDWARD C. TWIST, PETITIONER,

vs.

PRAIRIE OIL & GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1926

CERTIORARI GRANTED MARCH 15, 1926

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF OKLAHOMA

Pleas and proceedings before the Honorable R. L. Williams, judge of the District Court of the United States for the Eastern District of Oklahoma, presiding, in the following entitled cause:

Equity. No. 2930

Edward C. Twist, Plaintiff,

vs.

Prairie Oil & Gas Company, a Corporation, Defendant.

Edward C. Twist, Appellant,

vs.

Prairie Oil & Gas Company, a Corporation, Appellee

Caption

Be it remembered, that this suit was begun in the District Court of Tulsa County, State of Oklahoma, and came to the United States District Court for the Eastern District of Oklahoma, upon Petition, Bond, and Order of Removal; the Transcript being filed in the office of said Clerk on the 15th day of September, 1922, and was given No. 2930 Equity.

The portion of the transcript from the District Court in and for Tulsa County, State of Oklahoma, called for in the stipulation of counsel, is in words and figures as follows:

State of Oklahoma,
County of Tulsa, ss:

In the District Court

No. 19966

Edward C. Twist, a Minor, by Leoria L. Twist Welby, Guardian, Plaintiff,

vs.

Prairie Oil & Gas Company, a Corporation, Defendant

Attorney's Lien Claimed

Petition—Filed in District Court of Tulsa County August 3, 1922; in District Court of United States, September 15, 1922

Comes now the plaintiff, and shows to the Court that Edward C. Twist is a minor under guardianship, residing in the County of Tulsa, State of Oklahoma, and that Leoria [fol. 2] L. Twist Welby is his duly qualified, appointed and acting guardian, and that the defendant, Prairie Oil & Gas Company is a corporation doing business in the State of Oklahoma, which may be legally served therein.

I. For cause of action herein, plaintiff alleges that heretofore, to wit, on the 22nd day of March, 1915, William G. Twist, then the guardian of Edward C. Twist, a minor, executed to Los Angeles Cherokee Oil Company, a corporation, an oil and gas mining lease covering the following described land, to-wit:

The North Half (N. 2) of the Southeast Quarter (S. E. 4) of the Northeast Quarter (N. E. 4) and the Southeast Quarter (S. E. 4) of the Southeast Quarter (S. E. 4) of the Northeast Quarter (N. E. 4) of Section 24, Township 20 North, Range 12 East, in Tulsa County, Oklahoma,

which said lease by its terms expired on the 21st day of March, 1920, and which said lease was duly and legally approved and confirmed, and was up to and including the last mentioned date in full force and effect; that the said lands were and are the property of the plaintiff, Edward C. Twist,

being a portion of his allotment as a member of the Cherokee Tribe of Indians.

2. That thereafter, and on, to wit, the 5th day of June, 1916, the said Los Angeles-Cherokee Oil Company lessee, caused to be instituted in the County Court of Tulsa County, State of Oklahoma, a certain proceeding whereby they sought to extend the terms of the original lease theretofore executed, for a period as long as oil and gas is found in paying quantities. Said proceeding was instituted by a petition filed by the guardian, setting out that the said lessee desired an extension, and that they had agreed upon a sum of money to be paid and an increase of the royalty, a copy of which petition is attached hereto, made a part hereof and marked "Exhibit A."

Pursuant to said petition, an order of the County Court was entered, setting for hearing the said petition, of which order copy is hereto attached and made a part of this petition, marked "Exhibit B," which said order fixed the 16th day of June as the date for hearing the petition of the guardian for authority to extend the said lease. On the 16th day of June, 1916, the said guardian filed her petition and report, showing the full agreement with the said Los Angeles-Cherokee Oil Company, a copy of which report and return is hereto attached, made a part of this petition and marked "Exhibit C." On the same day, to wit, June 16, 1916, the court entered an order confirming and approving the agreement theretofore made and executed between the guardian [fol. 3] and the said lessee, a copy of which order is hereto attached and made a part of this petition, marked "Exhibit D."

3. Plaintiff attaches hereto and makes a part hereof "Exhibit E," a copy of said stipulation and agreement so as aforesaid entered into between the said guardian and the said lessee.

4. Plaintiff further alleges that the said proceedings for the extension of said lease are wholly void and unauthorized; that no opportunity was given for bids by others than the said lessee; that the property was not sold at public auction; that the property was sold as shown by the said petition, return and order, in bulk, together with other

property belonging to other minors, and together with an undivided interest in additional property belonging to this plaintiff, and that the proceedings therein had in no sense protected the minor ward and was contrary to the laws of the State of Oklahoma, for such proceedings and was in contravention of the rules of the Supreme Court relating to such procedure and particularly to Rule 9, promulgated on June 11, 1914, and effective at the date said proceedings attempting to extend said lease were had, which Rule was in words and figures as follows:

"No oil and gas or other mineral leases belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed five days before the same are sold, as provided herein. A notice of said sale must be given by posters and by publication where publication is practicable."

By virtue of said so-called extension therefore, the said Los Angeles Cherokee Oil Company received no further or additional title than was already received by them by the lease originally executed, which expired as aforesaid; that the Los Angeles Cherokee Oil Company, by proper assignment thereafter attempted to convey all their right, title and interest to the Prairie Oil and Gas Company, and by said assignment the defendant, Prairie Oil and Gas Company obtained the leasehold estate up to and including the final termination of the original lease on March 21, 1920, and no more.

That notwithstanding the expiration of said lease, the defendant Prairie Oil and Gas Company has ever since March 21, 1920, continued to withdraw from said property and appropriate to its own use and benefit the oil and gas from certain wells theretofore drilled on said property, the [fol. 4] value of the oil and gas so taken therefrom wrongfully by the defendant being Fifty Thousand Dollars ($50,000.00).

5. That said extension agreement so executed by the said guardian, Leoria L. Twist Weldy, was void for the further reason that it was procured by the fraud, duress and false dealing of the Los Angeles Cherokee Oil Company so exerted that the said agreement was procured for a grossly

inadequate consideration, the acual value of the said agreement at the date thereof being not less than $175,000.00, while the consideration actually paid was only $18,000.00, the lands herein described as the allotment of the said Edward C. Twist and covered by this action being included in said extension agreement. That said false and fraudulent dealing and duress consisted of the following acts and representations, to wit: That the officer of the said Los Angeles Cherokee Oil Company having full and complete control of the operations of the company, and of all its business was one J. F. Pitt, and another of the said officers and agents of the said company, was one H. P. Anderson; and that said officers and agents of the said company, expecting to secure the said agreement, and with the view of obtaining influence and the friendship and confidence of the said Leoria L. Twist Weldy, the said guardian, proposed, agreed to and did execute her bond as guardian, and are now the bondsmen upon the guardian's bond of the said guardian. That prior to the date of the said agreement, they, and particularly the said Pitt, advised the said guardian that it was beneficial and to the best interest of the said wards that such an extension agreement should be executed, and that a consideration of $18,000.00 was adequate and sufficient therefor, which said statements and representations were false and known to the said Pitt to be false, but which said representations were relied upon by the said guardian, who placed implicit confidence in the judgment of the said bondsmen, knowing them to be practical and experienced oil men. That to further the said scheme to secure the said agreement, the said officers and agents approached the attorney for the said guardian, E. Robitaille, and endeavored to secure his co-operation, and also sought the influence of the ward, Albert T. Twist, and failing to secure their aid in their efforts they resorted to threats, and advised the guardian that they would be compelled to complain to the court of her failure to do what they represented to be for the best interests of the wards, and sugested to the said son of the guardian, Albert T. Twist, that his mother could be removed as guardian if she failed to carry out their desires; and the guardian, believing that this course was capable of being pursued by them, and fearing that the affairs of her children might be placed in the hands of strangers,

[fol. 5] consented to the proposed agreement, and signed the papers prepared for her by the said officers of the said company. That to further lull the suspicions of the guardian, and to present the apearance of fair dealing, the said Los Angeles-Cherokee Oil Company, through its said agents, officers and attorneys, prepared what purported to be a notice of sale, so that it appears that notice of a public sale was given, but plaintiff avers that said notice is in fact a notice to show cause why a sale should not be had, and that no order of sale was in fact ever made and entered by the court, and no public sale had, but that the agreement was made pursuant to an understanding had prior thereto, and without opportunity to others than the said Los Angeles-Cherokee Oil Company to bid thereon. All of which more fully and clearly appears from the petition of the guardian filed in the County Court, a copy of which appears as a part of this petition, hereto attached and marked "Exhibit A"; the order setting said petition for hearing, of which a copy appears as a part of this petition, hereto attached and marked "Exhibit B"; the so-called notice of sale, together with proof of posting thereof, a copy of which is hereto attached, made a part hereof and marked "Exhibit F"; the guardian's return and report of sale and extension, a copy of which is hereto attached made a part of this petition and marked "Exhibit C"; and the order of confirmation, a copy of which is made a part of this petition, and is hereto attached, as "Exhibit D"; all of said documents being a part of the records in the County Court of Tulsa County, in Probate No. 168, styled "In the Matter of the Guardianship of Albert T. Twist, Edward C. Twist and Jessie L. Twist, minors."

Wherefore, plaintiff prays judgment against the said defendant as damages for their trespass as aforesaid in the sum of Fifty Thousand ($50,000.00) Dollars, together with all costs herein laid out and expended.

Second Cause of Action

Plaintiff further complaining of the defendant, for second cause of action herein adopts and reiterates each and every allegation contained in the above and foregoing first cause of action, and for further cause of action alleges:

1. That the stipulation so as aforesaid executed by Leoria L. Twist Weldy, as guardian of the plaintiff to the Los Angeles-Cherokee Oil Company, purporting to extend the lease herein mentioned so long as oil and gas is found in paying quantities, is now and has been ever since the 21st day of March, 1920, a cloud upon the title of your plaintiff, which he is powerless to remove without the intervention of a court of equity.

[fol. 6] Wherefore, plaintiff prays that said stipulation so as aforesaid executed without authority of law, be cancelled, set aside and held for naught, and that the title of the plaintiff herein be quieted against the defendant, and that the defendant be enjoined from ever asserting any right, title, claim or interest in the said land or any part thereof, or from further trespassing thereon; and plaintiff prays for such other and further relief as in the premises he may be entitled to, and for his costs.

James S. Watson, Linebaugh & Pinson, Attorneys for Plaintiff.

Attorney's lien claimed.

[File endorsement omitted.]

STATEMENT RE EXHIBIT A TO PETITION

[CLERK'S NOTE.—This exhibit, being petition for leave to extend leases, is the same as Exhibit B in the case of Edward C. Twist et al. vs. Prairie Oil & Gas Co., No. 2929, and is omitted as per stipulation of counsel.]

STATEMENT RE EXHIBIT B TO PETITION

[CLERK'S NOTE.—This exhibit, being order setting date for hearing petition for leave to extend leases, is the same as Exhibit C in the case of Edward C. Twist et al. vs. Prairie Oil & Gas Co., No. 2929, and is omitted as per stipulation of counsel.]

STATEMENT RE EXHIBIT C TO PETITION

[CLERK'S NOTE.—This exhibit, being report and return of guardian and administratrix, is the same as Exhibit D in the case of Edward C. Twist et al. vs. Prairie Oil & Gas Co., No. 2929, and is omitted as per stipulation of counsel.]

STATEMENT RE EXHIBIT D TO PETITION

[CLERK'S NOTE.—This exhibit, being order allowing guardian to enter an agreement to extend leases, is the same as Exhibit E in the case of Edward C. Twist et al. vs. Prairie Oil & Gas Co., No. 2929, and is omitted as per stipulation of counsel.]

[fol. 7] EXHIBIT E TO PETITION

Agreement Extending Term of Lease

This agreement, made this 16th day of June, 1916, by and between Edward C. Twist, a minor, by his guardian, Leoria L. Twist Weldy, as party of the first part, and the Los Angeles Cherokee Oil Company, a corporation, of Los Angeles, California, and transacting business at Tulsa, Oklahoma, of the second part, Witnesseth:

That whereas, heretofore, on the 22nd day of March, 1905, William G. Twist as guardian then of Edward C. Twist, a minor, made, executed and delivered to the Los Angeles Cherokee Oil Company, a corporation, of Los Angeles, California an oil and gas mining lease covering the following described lands to wit:

The North Half (N. 2) of the Southeast Quarter (S. E. 4) of the Northeast Quarter (N. E. 4), and the Southeast Quarter (S. E. 4) of the Southeast Quarter (S. E. 4) of the Northeast Quarter (N. E. 4) of Section Twenty-four (24), Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian containing thirty (30) acres, more or less, situated in Tulsa County, State of Oklahoma, for a term of fifteen (15) years from date hereof.

And whereas, Leoria L. Twist Weldy, is now the duly appointed, qualified and acting guardian of said minor, and has secured the authority of the County Court of Tulsa County, Oklahoma, the court having jurisdiction of the guardianship proceedings to enter into this agreement.

Now therefore, in consideration of the sum of Two Thousand Five Hundred Sixty-three and 95/100 Dollars, ($2,563.95) in hand paid the receipt of which is hereby acknowledged, and an increase in the amount of royalty accruing to the fee owner under the terms of said lease from ten (10%) per cent to twelve and one-half (12½%) per cent, and the drilling of a well on said tract within six months from this date, it is agreed that the term of said lease shall be and hereby is extended for a period so long as oil or gas shall be produced from said lands, and the provision in said lease providing for a royalty of ten (10%) per cent of the value of the leased premises of all crude oil extracted from said land be, and the same is of this date increased to the amount of twelve and one half (12½) per cent of the value on the leased premises of all crude oil extracted from said land.

In witness whereof the parties hereto have set their hands this 16th day of June, 1916.

Leoria L. Twist Weldy, Guardian of Edward C. Twist, a Minor, Party of the First Part. Los Angeles Cherokee Oil Company, by Dan Murphy, President, Party of the Second Part.

[fol. 8] Attest: G. H. Murphy, Secretary. (Corp. Seal.)

STATEMENT RE EXHIBIT F TO PETITION

[CLERK'S NOTE—This exhibit, being a notice of sale and proof of publication, is the same as Exhibit L in the case of Edward C. Twist et al. vs. Prairie Oil & Gas Co., No. 2929, and is omitted as per stipulation of counsel.]

[File endorsement omitted.]

In United States District Court

[Title omitted]

Answer—Filed September 27, 1922

Now comes the defendant, Prairie Oil & Gas Company, and for its answer to the petition of the plaintiff, alleges and says:

That the allegations in said petition do not state facts sufficient in law or in equity to entitle the plaintiff to the relief prayed for, or to any relief.

The defendant admits the execution of the lease to the Los Angeles Cherokee Oil Company, set out in the plaintiff's petition, and admits the assignment of said lease, after the modification and extension thereof, as alleged in said petition, to this defendant, which assignment, it alleges, was made and executed on March 5, 1917, but denies that said lease is not a present, valid and subsisting lease for a term so long as oil or gas is found upon the land covered thereby.

It admits that proceedings were had in the County Court of Tulsa County, Oklahoma, as set forth in the plaintiff's petition, but as to whether the said Los Angeles Cherokee Oil Company caused said proceedings to be instituted, this defendant has no knowledge, and therefore denies the same, and also denies that the said proceedings for a modification and extension of said lease, and the said orders of the court and the acts of the guardian of the plaintiff thereunder, conferred no rights to the oil and gas under the lands covered by said lease beyond the original term of said lease.

[fol. 9] The defendant denies that the modification of said lease was procured by fraud of the Los Angeles Cherokee Oil Company, but as to whether the said Los Angeles Cherokee Oil Company made the statements, suggestions and misrepresentations alleged and set forth in said petition, and as to whether the agreement between the guardian of the plaintiff and said Los Angeles Cherokee Oil Company, directed and authorized by the County Court of Tulsa County, was the result of a prior understanding between said guardian and said Los Angeles Cherokee Oil Com

pany, this defendant is without knowledge, and in this connection avers that if said statements, suggestions and representations were made, the same is insufficient to constitute fraud.

The defendant admits that on the 5th day of June, 1916, the guardian of the plaintiff filed her petition in the County Court of Tulsa County, Oklahoma, praying for authority to modify, and extend the term of, said lease, and it alleges and shows to the Court that the said petition was set for hearing by the said County Court, and petitioner therein was required by said County Court to give notice of her said application by posting the same in three (3) public places in said Tulsa County; that on the 5th day of June, 1916, there was posted in Tulsa County, Oklahoma, in three (3) public places therein, one being on the door of the courthouse in the City of Tulsa, in said County, a notice that in pursuance of an order of said County Court, the said Leoria L. Twist Weldy, as guardian of the plaintiff, and as administratrix of the estate of William G. Twist, deceased, would sell to the highest bidder, subject to confirmation by the Court, on Friday, June 16, 1916, in the County Court room in the City of Tulsa, Oklahoma, an extension of an oil and gas lease on said land for a bonus in cash, payable upon confirmation of the sale; a copy of which notice with proof of posting is hereto attached, marked "Exhibit A" and made a part of this answer.

This defendant further alleges that said Los Angeles-Cherokee Oil Company offered to pay for an extension of said lease, the sum of Twenty five Hundred Sixty-three and 95/100 Dollars ($2,563.95), and also agreed to increase the royalty prescribed in said lease from ten (10) per cent to twelve and a half (12½) per cent, and to drill a well upon the land within six (6) months from the date of acceptance of said offer and its confirmation by said County Court.

That on the 16th day of June, 1916, the said County Court approved said offer and did thereupon authorize and direct the plaintiff's guardian to enter into a stipulation or agreement, extending the term of said lease for a period [fol. 10] continuing so long as oil or gas should be found in said land, with which order and direction, the guardian duly complied, and the stipulation and agreement so executed

was approved and confirmed by the Court by its order as set forth in plaintiff's petition and the exhibits thereto.

Further answering, this defendant says: That under its assignment of said lease from the Los Angeles Cherokee Oil Company, it has taken possession of the lands covered thereby, and admits that it has been operating the same and removing the oil and gas therefrom, but denies that it has taken oil and gas of the value set forth in the plaintiff's petition, and in this connection alleges and says that whether or not the modification and extension of said lease, is or was valid and binding upon the plaintiff, this defendant, since it became the owner of said modified and extended lease under its said assignment, has developed and operated the lands at its own expense, in good faith, and in the belief that it had a legal right so to do, and that if the Court should adjudicate and determine that said extension of the term of said lease was ineffective, the plaintiff is entitled only to the value of the oil and gas in place, and not its value after the same has been extracted from the land.

This defendant, further answering, says: That at the time of its purchase of the assignment of said lease from the Los Angeles Cherokee Oil Company, to wit, on March 5, 1917, it paid to the said Los Angeles Cherokee Oil Company more than One Thousand Dollars ($1,000.00); that said consideration was bona fide and actually paid; that at the time of paying the consideration for such assignment and transfer, and at the time of the delivery thereof, this defendant had no notice or knowledge of the various transactions and representations alleged and set forth in plaintiff's petition between its assignor and the plaintiff's guardian, and had no notice or knowledge of any proceedings or transactions relative to the modification and extension of said lease other than as shown by the records of the proceedings in the County Court of Tulsa County, Oklahoma, but avers that its purchase of said lease, and the payment of the consideration therefor, was in reliance upon the apparent legal title of the said Los Angeles Cherokee Oil Company, as shown by the public records.

Wherefore, the defendant prays:

1. That after due and proper hearing, the plaintiff's petition be dismissed for want of equity.

2. That the Court by its decree, declare and determine that the defendant's title to said oil and gas lease, as modi-
[fol. 11] fied and extended, is good, valid and subsisting as against any claim of the plaintiff, and that its title thereto be quieted as against said claims.

T. J. Flannelly, Paul B. Mason, West, Sherman, Davidson & Moore, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Reply.—Filed November 4, 1922

For reply to the answer of the defendant herein filed, plaintiff denies that the assignment of the Los Angeles-Cherokee Company to the defendant was executed on March 5, 1917, and denies that said assignment was executed in good faith on behalf of The Prairie Oil & Gas Company, and denies that it was executed without notice on their part of the equities of this plaintiff; and avers the facts to be that, prior to the execution of said modification, the defendant had agreed with the Los Angeles Cherokee Oil Company upon the purchase price of the said property, and that the modification and extension of said lease was sought and secured by the Los Angeles Cherokee Oil Company for and on behalf of The Prairie Oil and Gas Company, the defendant herein, at the time the same was secured.

Plaintiff admits the posting of the purported notice, as set out in said Answer, and that the petition and the said purported notice and the order of the court authorizing the same and confirming the same, constituted the sole proceedings in this matter for the transfer of the title.

And plaintiff further avers that no petition was filed sufficient to give to the County Court of Tulsa County jurisdiction in said action, for the reason that, at the date of the petition so filed, to wit: June 5, 1916, the lands involved herein were producing oil and gas; that the purpose and effect of said petition and the orders made pursuant thereto, were to sell and convey to the said Los Angeles Cherokee

Oil Company a known and described portion of the corpus of the real estate of the said minor ward; that no effort was made in any particular to follow the statutes of the State of Oklahoma prescribing the method of procedure necessary to sell the lands and real estate of a minor ward, and that the court was without jurisdiction to enter such orders.

[fol. 12] Wherefore plaintiff prays judgment of this court.

Jas. S. Watson, Linebaugh & Pinson, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Decree—Filed April 27, 1923

Be it remembered, that this cause came on to be heard at a former term of the Court and was argued by Counsel and taken under advisement.

Now on this 27th day of April, 1923, this cause coming on to be further heard by the court and it appearing that since the former hearing the said Edward C. Twist has become of lawful age, he is hereby substituted as plaintiff.

And the Court being now fully advised in the premises, finds all the issues, and concludes in favor of the defendant.

It is, therefore, ordered, adjudged and decreed as follows, viz:

That the Plaintiff's petition be, and it is hereby, dismissed for want of equity, at his costs.

It is further ordered, adjudged and decreed that the defendant is the owner of, and has a good and valid title to, an oil and gas mining lease on the

North Half (N. 2) of the Southeast Quarter (S. E. 4) of the Northeast Quarter (N. E. 4) and the Southeast Quar er (S. E. 4) of the Southeast Quarter (S. E. 4) of the Northeast Quarter (N. E. 4) of Section Twenty four (24), Township Twenty (20) North, Range Twelve (12) East, in Tulsa County, Oklahoma,

for a period extending so long as oil or gas is produced from said land, the defendant's title to which is hereby quieted and confirmed as against the claims of the plaintiff.

To all of which the plaintiff excepts, which exceptions are allowed, and in open court gives notice of appeal.

R. L. Williams, Judge.

O K as to form. Linebaugh & Pinson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 13] In United States District Court

Statement re Statement of the Evidence

[Clerk's Note.—The evidence in this case being the same as in the case of Edward C. Twist et al. v. Prairie Oil & Gas Co., No. 2929, is omitted as per stipulation of counsel.]

In United States District Court

[Title omitted]

Petition for Appeal—Filed June 23, 1923

To the Honorable R. L. Williams, District Judge for the Eastern District of the State of Oklahoma:

The above named plaintiff, feeling himself aggrieved by the decree made and entered in the above styled cause, on the 27th day of April, 1923, does hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, which is filed herewith. The plaintiff prays that said appeal be allowed and that citation issue, as provided by law, and that a transcript of record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, in the State of Missouri.

And your petitioner further prays that proper order, touching the security to be required of him to perfect his appeal, be made.

James S. Watson, Linebaugh & Pinson, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Assignment of Errors—Filed June 23, 1923

And now on this 23d day of June, 1923, comes the plaintiff, by his attorneys, James S. Watson and Linebaugh & Pinson, and says that the decree entered in the above cause on the 27th day of April, 1923, is erroneous and unjust to the said plaintiff:

1. Because the Court erred in holding, adjudging and decreeing that the County Court of Tulsa County, Oklahoma, had jurisdiction on the 16th day of June, 1916, to enter an order directing Leoria L. Twist Weldy, as guard[fol. 14] ian of Albert T. Twist, Edward C. Twist and Jessie L. Twist, to enter into an agreement with the Los Angeles Cherokee Oil Company, extending the terms of certain oil and gas mining leases covering the estates of said minor wards.

2. Because the court erred in holding, adjudging and decreeing that an extension of the terms of the oil and gas mining lease upon the lands of the said named wards was valid, though not made nor executed in compliance with the rules of the Supreme Court of the State of Oklahoma and the Statutes of the State of Oklahoma, relative to the sales of personal and real property of minor wards.

3. Because the court erred in holding, adjudging and decreeing that the County Court of Tulsa County, Oklahoma, on the 16th day of June, 1916, had jurisdiction to direct the sale or grant of oil and gas leases, as administrator and as guardian, acting conjointly, so that the same should cover, in addition to the lands of the above named Edward C. Twist, plaintiff, then a minor, the lands of William G. Twist,

the father of said plaintiff, in whose land the said plaintiff inherited an undivided interest.

4. Because the Court erred in holding, adjudging and decreeing that certain oil and gas mining leases, or extension agreements, made and executed prior to the termination of oil and gas leases then existing on the lands of said minor wards, and over lapping with said leases, are valid and of full force and effect.

5. Because the Court erred in failing and refusing to hold that certain minor Indian wards, restricted under the laws of Congress, were not subject to the protection afforded by certain probate rules enacted by the Supreme Court of Oklahoma, at the special instance and request of the Commissioner of Indian Affairs of the United States, as a part of the program of the United States for the protection of said minor Indian wards.

6. Because the Court erred in holding, adjudging and decreeing that said rules were directory merely, and were not jurisdictional, in the face of the determination by the Supreme Court of the State of Oklahoma, that said rules are and have always been jurisdictional.

7. Because the Court erred in holding, adjudging and decreeing that an oil and gas mining lease, made for a grossly inadequate consideration, without compliance with the Statutes and probate rules of the State of Oklahoma, was nevertheless valid and enforceable.

8. The Court erred in holding, adjudging and decreeing that the action herein constitutes a collateral attack upon [fol. 15] the so-called decree of the County Court of Tulsa County, Oklahoma.

9. Because the Court erred in holding, adjudging and decreeing that the County Court of Tulsa County, Oklahoma, ever in fact made any order under and by virtue of which the guardian of the above named minor wards was authorized to execute the said extension.

10. Because the Court erred in holding, adjudging and decreeing that certain statements made by representatives of the Los Angeles Cherokee Oil Company to Leoria L. Twist Weldy, as guardian of the minor wards above named,

to the effect that if the leases were not extended they would place vacuums on the wells, the effect of which would be to destroy the wells; and the further statement that the sum of $18,000.00 was more than the extension leases were worth, and the further insinuations and statements that other people were seeking the guardianship of her minors, which caused a fear in the mind of the guardian that the guardianship of her own children might be taken from her, or the wells destroyed, if she did not make the extension leases, and each and all of said suggestions, taken together, did not constitute such fraud or duress upon the guardian as, coupled with the inadequacy of consideration, was sufficient to nullify the lease or extension agreement.

11. Because the Court erred in holding, adjudging and decreeing that an extension oil and gas lease, made without an order of sale and without competitive bidding, conveyed title to the oil and gas, together with the equipment, real and personal property, of the said minor wards.

12. The Court erred in holding, adjudging and decreeing that the guardian of the minor wards, joined by the administrator of the estate of William G. Twist, deceased, had the power, or that the County Court of Tulsa County had the authority, to consummate a sale of the various interests in William G. Twist's estate, and in the lands of Albert T. Twist, Edward C. Twist and Jessie L. Twist, jointly, for the lump sum of $18,000.00, without any appraisement of the various properties, without any opportunity for an open market, resulting in the arbitrary division of the amount so received, without regard to the value of the respective properties.

13. Because the Court erred in refusing to permit the witness, Albert T. Twist, to testify as to the statements of Mr. Pitt, made to him a short time before the petition for extension of lease was filed, and which he communicated to his mother.

[fol. 16] 14. Because the Court erred in failing and refusing to permit the witness Phillips to testify as to the market value of the leases so sold in the year 1916.

15. Because the Court erred in failing and refusing to set aside and vacate the leases, or extension agreements,

executed by the said guardian and administrator, together with the purported orders of court relating thereto, for the reason that the leases were wholly void and the orders of the court so made were without jurisdiction.

Wherefore the plaintiff prays that the said decree be reversed and that this court render a proper decree on the record, cancelling said lease, and granting judgment to the plaintiff for the sum of money which the record shows to be due him since the expiration of the original lease on the land involved, and for such other relief as to the Court may seem proper and just.

James S. Watson, Linebaugh & Pinson, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Order Allowing Appeal—Filed June 23, 1923

On this 23rd day of June, 1923, came on to be heard the petition of the plaintiff above named for an order allowing appeal, and thereupon, it was by the Court ordered that said petition be granted and the appeal allowed upon the plaintiff giving bond, conditioned as required by law, in the sum of two hundred fifty dollars.

R. L. Williams, Judge.

[File endorsement omitted.]

Bond on appeal for $250.00, approved and filed August 13, 1923, omitted in printing.

[fol. 17] In United States District Court

[Title omitted]

Stipulation as to Printing Record

It is hereby stipulated and agreed by and between the undersigned, attorneys for plaintiffs as appellants, and the defendant, as appellee and cross appellant in case #2929,

that the record on appeal shall be complete and full when certified by the Clerk to contain, according to the terms of [fol. 18] this stipulation, the following portions of the record of the proceedings in this case, and none other, to-wit:

1. The petition of the plaintiff.

2. The answer and cross petition of the defendant.

3. The reply and answer of the plaintiff.

4. The full and complete evidence as taken and transcribed, and filed in this cause by the plaintiff, instead of a reduced statement thereof.

5. Judgment or decree of the Court.

6. The petition of plaintiff for appeal, assignments of error and order allowing appeal.

7. Appeal bond.

8. Petition of defendant for cross appeal in case #2929, assignment of errors, order allowing appeal and supersedeas bond.

9. This stipulation.

It is further stipulated and agreed that the [illegible]ment of the transcript, suggestions of amendments, citation and filing of praecipe for printing the record are waived, and that the Clerk may proceed to print the record and certify the same in accordance with this stipulation and transmit the same to the United States Circuit Court of Appeals.

It is further stipulated and agreed that by reason of the four cases mentioned in the caption having been consolidated for trial and presenting the same questions of law and fact, the record in each of the said four cases shall be similarly printed; that is to say, that the record shall be the record of the consolidated cases, and the requisite number of copies in each case shall be bound and entitled in the particular cases, and it is further stipulated that the four cases shall be consolidated on appeal and presented as a consolidated case with the approval of the Appellate Court, the same record to be used by both parties on their respective appeals.

Each and every provision and term of this stipulation shall be subject to the approval of the trial court.

James S. Watson, Linebaugh & Pinson, Attorneys for Appellants. West, Sherman, Davidson & Moore, Attorneys for Appellee and Cross-appellant in Cause #2929.

[fol. 19] In United States District Court

Order Approving Stipulation—Filed August 13, 1923

It is ordered that the terms and provisions contained in the foregoing stipulation be and they are hereby approved, this the 31st day of August, 1923.

R. L. Williams, Judge.

[File endorsement omitted.]

In United States District Court

Additional Stipulation as to Printing Record—Filed August 24, 1923

In addition to the stipulation heretofore filed herein, relative to the record in this cause for appeal to the Circuit Court of Appeals for the Eighth Circuit, and for the purpose of further simplifying the record in the above cases, which it is anticipated will be consolidated for briefing and argument.

It is hereby stipulated and agreed by and between the parties hereto that the record, as agreed by prior stipulation entered into herein and approved by the Court, shall be printed in full in No. 2929, Edward C. Twist, Kuroki Twist and Willie V. Twist, minors, by Leoria L. Twist Weldy, Guardian, Albert T. Twist and Jessie L. Payne, nee Twist, plaintiffs, vs. Prairie Oil & Gas Company, a corporation, defendant, and that in each of the other cases above referred to the record shall consist of the pleadings, the former stipulation and this stipulation, and that the record in No. 2929 shall be and become a part of the record in each of the other cases above styled, by reference thereto.

It is intended hereby to avoid the incorporation of all exhibits and all of the evidence in each record of each particular case.

Dated this 18th day of August, 1923.

Jas. S. Watson, Linebaugh & Pinson, Attorneys for Appellants. West, Sherman, Davidson & Moore, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 20] Clerk's certificate to foregoing transcript omitted in printing.

21 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

In The United States Circuit Court of Appeals For the Eighth Circuit.

Edward C. Twist, Appellant,
No. 6500 vs.
Prairie Oil & Gas Company, a corporation Appellee.

The undersigned, counsel for Edward C. Twist, Appellant, hereby enter therein appearance in this court and pray that they be enrolled as of counsel for such appellant.

JAMES S. WATSON,
D. H. LINEBAUGH,
PAUL PINSON,
F. B. FITE, JR.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 9, 1923.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Apellee.

J. T. FLANNELLY,
PAUL B. MASON,
PRESTON C. WEST,
ROGER S. SHERMAN,
GREY MOORE,
A. A. DAVIDSON.

(Endorsed: Filed in U. S. Circuit Court of Appeals, Nov. 3, 1923.

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22 (Order of Submission and Opinion.)

Memorandum of Clerk:

On the 3rd day of December, 1924, this cause, together with causes Nos. 6499, 6501, 6502 and 6508, were submitted to the United States Circuit Court of Appeals for the Eighth Circuit, and on the 9th day of May, 1925, an opinion of the said United States Circuit Court of Appeals was filed in causes Nos. 6499, 6500, 6501, 6502 and 6508, and a full copy of the order of submission and of the opinion having been includ-

ed in the transcript taken for the Supreme Court of the United States on an application for writ of certiorari in cause No. 6499, Edward C. Twist, et al., Appellants, vs. Prairie Oil & Gas Company, a corporation, Appellee, the same are omitted from the transcript in this cause, No. 6500.

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23 (Decree.)

United States Circuit of Appeals, Eighth Circuit.

May Term, 1925,
Saturday, May, 9, 1925.

Edward C. Twist, Appellant,
No. 6500. vs.
Prairie Oil and Gas Company, a corporation.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Prairie Oil and Gas Company, a corporation, have and recover against Edward C. Twist the sum of twenty dollars for its costs herein and have execution therefor.

May 9, 1925.

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24 (Petition for and Order Denying Rehearing.)

Memorandum of Clerk:

On the 6th day of July, 1925, a petition for rehearing was filed by Edward C. Twist and others in causes Nos. 6499, 6500, 6501, 6502 and 6508, and on the 2nd day of December, 1925, an order was entered in said causes denying the said petition for rehearing, and a full copy of the petition for rehearing and of the order denying the petition having been included in the transcript taken for the Supreme Court of the United States on an application for writ of certiorari in cause No. 6499, Edward C. Twist, et al., Appellants, vs. Prairie Oil & Gas Company, a corporation, Appellee, the same are omitted from the transcript in this cause, No. 6500.

(Motions for Stay of Issuance of Mandates and Orders thereon.)

Memorandum of Clerk:

On the 15th day of December, 1925, a motion for stay of mandates was filed by counsel for appellants in causes Nos. 6499 and 6500, and an order was entered staying the issuance of the mandates for a period of forty days from and after December 15, 1925. On the 26th day of January, 1926, a motion for a further stay of the mandates was filed in said causes and an order entered further staying the issuance of the mandates until February 16, 1926. A full copy of each of the motions and of each of the orders having been included in the transcript taken for the Supreme Court of the United States on an aplication for writ of certiorari in cause No. 6499, Edward C. Twist, et al., Appellants, vs. Prairie Oil & Gas Company, a corporation, Appellee, the same are omitted from the transcript in this cause, No. 6500.

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25 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of the pleadings, record entries and proceedings, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Edward C. Twist was Appellant and the Prairie Oil & Gas Company, a Corporation, was Appellee, No. 6500, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of February, A. D. 1926.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 26] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 22, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 302

EDWARD C. TWIST, ALBERT T. TWIST, AND JESSIE L. PAYNE, NEE TWIST, PETITIONERS,

vs.

PRAIRIE OIL & GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1926

CERTIORARI GRANTED MARCH 15, 1926

(21,700)

(31,709)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 302

EDWARD C. TWIST, ALBERT T. TWIST, AND JESSIE L. PAYNE, NEE TWIST, PETITIONERS,

vs.

PRAIRIE OIL & GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1926

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF OKLAHOMA

Pleas and proceedings before the Honorable R. L. Williams, judge of the District Court of the United States for the Eastern District of Oklahoma, presiding, in the following entitled cause:

Equity. No. 2929

EDWARD C. TWIST, KUROKI TWIST, and WILLIE V. TWIST, Minors, by Leoria L. Twist Weldy, Guardian; Albert T. Twist, and Jessie L. Payne, Plaintiffs,

vs.

PRAIRIE OIL & GAS COMPANY, a Corporation, Defendant

EDWARD C. TWIST, ALBERT T. TWIST and JESSIE L. PAYNE, nee TWIST, Appellants,

vs.

PRAIRIE OIL & GAS COMPANY, a Corporation, Appellee

THE PRAIRIE OIL & GAS COMPANY, Appellant,

vs.

KUROKI TWIST and WILLIE V. TWIST, Appellees

CAPTION

Be it remembered that this suit was begun in the District Court of Tulsa County, State of Oklahoma, and came to the United States District Court for the Eastern District of Oklahoma, upon Petition, Bond, and Order of Removal; the [fol. 2] Transcript being filed in the office of said Clerk on the 15th day of September, 1922, and was given No. 2929 Equity.

The portion of the transcript from the District Court in and for Tulsa County, State of Oklahoma, called for in the stipulation of counsel, is in words and figures as follows:

State of Oklahoma,
County of Tulsa, ss:

In the District Court

No. 19965

Edward C. Twist, Kuroki Twist, and Willie V. Twist, by Leoria L. Twist Weldy, Guardian; Albert T. Twist, and Jessie L. Payne, nee Twist, Plaintiffs,

vs.

Prairie Oil & Gas Company, a Corporation, Defendant

Attorneys' Lien Claimed

Petition—Filed in District Court of Tulsa County, August 3, 1922; in District Court of United States September 15, 1922

Come now the plaintiffs, Edward C. Twist, Kuroki Twist and Willie V. Twist, minors, by Leoria L. Twist Weldy, Guardian, Albert T. Twist and Jessie L. Payne nee Twist, and for cause of action against the defendant, Prairie Oil & Gas Company, allege:

That Edward C. Twist, Kuroki Twist and Willie V. Twist are all minors, under guardianship, and that Leoria L. Twist Weldy is their duly appointed, qualified and acting Guardian, under the jurisdiction of the County Court of Tulsa County, State of Oklahoma;

That Prairie Oil & Gas Company is a corporation, doing business within the State of Oklahoma, with officers and agents in Tulsa, upon whom service of summons may be had.

1. Plaintiffs allege that William G. Twist died intestate in Tulsa County, State of Oklahoma, on or about the 27th day of June, 1907, leaving surviving him his widow, now Leoria L. Twist Weldy, and the following children: Edward C. Twist, Kuroki Twist, Willie V. Twist, Albert T. Twist and Jessie L. Payne, nee Twist, plaintiffs in this action.

2. That at the time of his death, he was seized of the following described lands, to wit:

Lot Three (3), Section 19, Township 20 N., Range 13 E., the north 15.28 acres of Lot Seven (7), Section 14, Township 20 N., Range 12 E., and the South Half (S. 2) of the Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) and the Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) of the Southeast Quarter (S. E. 4) of Section 24, Township 20 N., Range 12 E., in Tulsa County, State of Oklahoma.

3. That the said William G. Twist, prior to his death, executed to the Los Angeles Cherokee Oil Company, a corporation, a certain oil and gas mining lease covering the above [fol. 3] described lands, which lease by its terms expired on the 29th day of September, 1919, and that said lease remained in full force and effect up to and including the said 29th day of September, 1919; that by virtue of assignment, properly executed and recorded, the defendant, Prairie Oil & Gas Company became the owner of all the right, title and interest of the Los Angeles Cherokee Oil Company under and by virtue of said lease so executed by the said William G. Twist.

4. That on the 17th day of June, 1910, in the matter of the estate of William G. Twist, deceased, the County Court of Tulsa County, State of Oklahoma, entered its final decree, copy of which is hereto attached, made a part hereof and marked "Exhibit A," wherein and whereby it was decreed that the interests of the respective heirs in and to the property aforesaid were and are as follows: Leoria L. Twist 1 3 for life, Albert T. Twist 2 15, Jessie L. Twist 2 15, Edward C. Twist 2 15, Kuroki Twist 2 15 and Willie V. Twist 2 15. Plaintiffs further allege that subject to the life estate of the said Leoria L. Twist Weldy, they and each of them are entitled to an undivided one fifth (1 5) interest in and to the real property and premises above described.

5. That thereafter, and on, to-wit, the 5th day of June, 1916, the said Los Angeles Cherokee Oil Company procured the execution by the guardian of a certain petition, a copy of which is hereto attached, made a part hereof and marked "Exhibit B," which said petition was filed in the County Court of Tulsa County on the said 5th day of

June, 1916, and by which said petition the said lessee sought to secure through said guardian its so-called extension of the oil and gas mining lease then held and owned by them.

6. Pursuant to said petition and on the said 5th day of June, 1916, the County Court of Tulsa County entered its order setting the 16th day of June, 1916, as the date for hearing the said petition. A copy of said order, marked "Exhibit C," is hereto attached and made a part of this petition.

7. That no order of sale pursuant to said petition was ever entered by the County Court of Tulsa County, but on the said 16th day of June, 1916, a so-called report and return of guardian and administratrix was filed in the said County Court, of which a copy is annexed to this petition and marked "Exhibit D" and made a part hereof as though fully set out herein.

8. That thereafter on the said 16th day of June, 1916, a certain order of the County Court was entered, which purported to approve a certain agreement and stipulation theretofore entered into, between the guardian and the said [fol. 4] Los Angeles Cherokee Oil Company, of which a copy appears as a part of this petition, hereto attached and marked "Exhibit E".

9. That of the above described proceedings in the County Court of Tulsa County, Oklahoma, each and all of them referred to the estates only of the wards Albert T. Twist (now adult), Jessie L. Twist, now Jessie L. Payne (now adult), and Edward C. Twist; and that thereafter certain proceedings purporting or attempting to cover the interests of Kuroki Twist and Willie V. Twist, minor wards, were had as follows, to-wit:

On the 13th day of March, 1917, the said guardian, Leoria L. Twist Weldy, filed in the County Court of Tulsa County, her certain petition, of which a copy is attached and made a part of this petition, marked "Exhibit F," whereby the said guardian sought, by reason of an alleged prior inadvertence, to secure authority from the Court to join for her said wards in the stipulation theretofore entered into and hereafter referred to, without further or additional consideration and without any notice of hearing or any opportunity for public bidding thereon.

Pursuant to said petition the County Court on the said 13th day of March, 1917, entered an order authorizing the guardian of Kuroki Twist and Willie V. Twist to execute an extension of the oil and gas lease hereinabove referred to, a copy of said order being hereto attached, made a part of this petition and marked "Exhibit G."

Pursuant thereto the said guardian executed her report, showing that she has executed said extension agreement, which said report was filed on the said March 13, 1917, a copy of which is hereto attached and made a part hereof, marked "Exhibit H."

Whereupon, the County Court entered its order of confirmation of the same date, to wit, March 13, 1917, a copy of which is hereto attached, made a part of this petition and marked "Exhibit I."

10. Your plaintiffs hereto attach copy of the stipulation entered into between the said guardian, Leoria L. Twist Weldy, and the said Los Angeles-Cherokee Oil Company on the 16th day of June, 1916, as hereinabove referred to and marked the same for identification "Exhibit J."

11. The plaintiffs also attach a copy of the stipulation entered into on March 13, 1917, between the said guardian and the Los Angeles-Cherokee Oil Company, and make the same a part of this petition, as "Exhibit K," hereto.

[fol. 5] 12. That by virtue of the proceedings aforesaid and the assignment of the Los Angeles-Cherokee Oil Company to the defendant Prairie Oil & Gas Company, the said defendant has entered upon said premises and from and after the 29th day of September, 1919, has operated the same for oil and gas mining purposes, assuming to be the owners of the leasehold estate therein, withdrawing from the property vast quantities of oil and gas and appropriating the same to their own use and benefit, and that the amount and value of the oil and gas, sold, removed and appropriated by the defendant, plaintiffs allege to be the sum of $125,000.00.

13. That each and all of the proceedings above set forth were insufficient in law to confer upon the Los Angeles-Cherokee Oil Company or its assignee, Prairie Oil & Gas Company, any right, title or interest other than that con-

ferred by the original lease, executed by William G. Twist above described, all of which right, title and interest expired on the 29th day of September, 1919; that the said interest was sold in bulk, together with other entirely distinct interests of other persons in other lands; that the so-called sales of extension leases as aforesaid, were not made at public outcry, as provided by the laws of the State of Oklahoma, and the rules of the Supreme Court of the State of Oklahoma, especially as provided by Rule 9 of the Supreme Court of the State of Oklahoma, promulgated on June 11, 1914, effective July 14, 1914, which Rule is in words and figured as follows, to wit:

"No oil and gas or other mineral lease belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed five days before the same are sold, as provided herein. A notice of said sale must be given by posting and by publication where publication is practicable."

14. That as to the minor wards, Kuroki Twist and Willie V. Twist, the said proceedings are also void for the further reason that no consideration passed to said minors, but that they were forced by the action of the County Court and the guardian to participate in a proceeding theretofore had and that no opportunity was given them to protect their rights or to any other bidder to intervene.

15. That said extension agreement so executed by the said guardian, Leoria L. Twist Weldy, was void for the further reason that it was procured by the fraud, duress and false dealing of the Los Angeles Cherokee Oil Company so exerted that the said agreement was procured for a grossly inadequate consideration, the actual value of the said agree- [fol. 6] ment at the date thereof being not less than $175,(88118), while the consideration actually paid was only $18.(88118), the lands herein described as the allotment of the said William G. Twist, deceased, and covered by this action being included in said extension agreement. That said false and fraudulent dealing and duress consisted of the following acts and representations, to wit: That the officer of the said Los Angeles Cherokee Oil Company having

full and complete control of the operations of the company, and of all its business was one J. F. Pitt, and another of the said officers was one H. P. Anderson; and that said officers and agents of the said company, expecting to secure the said agreement, and with the view of obtaining influence and the friendship and confidence of the said Leoria L. Twist Weldy, the said guardian, proposed, agreed to and did execute her bond as guardian, and are now the bondsmen upon the guardian's bond of the said guardian. That prior to the date of the said agreement, they, and particularly the said Pitt, advised the said guardian that it was beneficial and to the best interest of the said wards that such an extension agreement should be executed, and that a consideration of $18,000.00 was adequate and sufficient therefor, which said statements and representations were false and known to the said Pitt to be false, but which said representations were relied upon by the said guardian, who placed implicit confidence in the judgment *to* the said bondsmen, knowing them to be practical and experienced oil men. That to further the said scheme to secure the said agreement, the said officers and agents approached the attorney for the said guardian, E. Robitaille, and endeavored to secure his cooperation, and also sought the influence of the ward, Albert T. Twist, and failing to secure their aid in their efforts they resorted to threats, and advised the guardian that they would be compelled to complain to the court of her failure to do what they represented to be for the best interests of the wards, and suggested to the said son of the guardian, Albert T. Twist, that his mother could be removed as guardian if she failed to carry out their desires; and the guardian, believing that this course was capable of being pursued by them, and fearing that the affairs of her children might be placed in the hands of strangers, consented to the proposed agreement, and signed the papers prepared for her by the said officer of the said company. That to further lull the suspicions of the guardian, and to present the appearance of fair dealing, the said Los Angeles Cherokee Oil Company through its said agents, officers and attorneys, prepared what purported to be a notice of sale, so that it appears that notice of public sale was given, but plaintiffs aver that said notice

is in fact a notice to show cause why a sale should not be had, and that no order of sale was in fact ever made and en- [fol. 7] tered by the court, and no public sale had, but that the agreement was made pursuant to an understanding had prior thereto, and without opportunity to others than the said Los Angeles Cherokee Oil Company to bid thereon. All of which more fully and clearly appears from the petition of the guardian filed in the County Court, a copy of which appears as a part of this petition, hereto attached, and marked "Exhibit B"; the order setting said petition for hearing, of which a copy appears as a part of this petition, hereto attached and marked "Exhibit C," the so called notice of sale, together with proof of posting thereof, a copy of which is hereto attached, made a part hereof and marked "Exhibit L," the guardian's return and report of sale and extension, a copy of which is hereto attached, made a part of this petition, and marked "Exhibit D," and the order of confirmation, a copy of which is made a part of this petition, and is hereto attached, as "Exhibit E," all of said document being a part of the records in the County Court of Tulsa County, in Probate No. 168, styled "In the Matter of the Guardianship of Albert T. Twist, Edward C. Twist and Jessie L. Twist, minors."

16. That the said acts of the defendant in removing the oil and gas from the premises above described constitute as to these plaintiffs a trespass from and after the 29th day of September, 1919, by reason of which they have been damaged in the sum of $125,000.00.

Whereof, plaintiffs pray judgment against the defendants for the sum of $125,000.00 together with all their costs herein laid out and expended.

Second Cause of Action

Plaintiffs further allege for their second cause of action herein:

1. That they adopt and hereby reiterate each and every allegation contained in the foregoing cause of action, as a part of this, their second cause of action.

2. Further complaining, plaintiffs allege that the stipulations, copies of which are hereto attached and marked "Exhibit K" and Exhibit J", which purport to extend the oil and gas mining lease herein referred to, which terminated and expired on the 29th day of September, 1919, and each of said stipulations are clouds upon the title of your plaintiffs, which, except by the action of a court of equity they are powerless to remove.

3. That your plaintiffs are the owners of 10/15ths of the oil and gas rights in said premises during the lifetime [fol. 8] of Leoria L. Twist Weldy, and are entitled to all of the oil and gas rights as remaindermen after her death. Plaintiffs admit that the defendant is the owner of the leasehold estate, insofar as the life hold estate of Leoria L. Twist Weldy is concerned, but that they have no right, title or interest in the remainder or in any portion of the life estate save and except the right to receive and take to themselves one third of the oil and gas produced on the premises above described.

Wherefore plaintiffs pray that they have judgment of this court declaring the respective interests of the parties hereto cancelling the stipulations heretofore executed between Leoria L. Twist Weldy, guardian and Los Angeles-Cherokee Oil Company, for the purpose of extending the lease as hereinabove described and set forth, and that the defendant be enjoined from hereafter asserting any right, title or interest in and to said property, save and except as to the life estate of the said Leoria L. Twist Weldy; that the title of your plaintiffs and their interests as herein set forth be quieted and confirmed, and that your plaintiffs have all other and further relief to which they may in equity be entitled.

(Signed) Jas. S. Watson, Linebaugh & Pinson, Attorneys for Plaintiff.

[File endorsement omitted.]

"Exhibit A" to Petition

State of Oklahoma,
County of Tulsa, ss:

In the County Court

In the Matter of the Estate of William G. Twist, Deceased; Leoria L. Twist, Administrtrix

Final Decree

It appearing to the court now here on satisfactory proofs and the evidence, that the necessary expenses of funeral, of last sickness of said deceased, and of administration of said estate, have been fully paid, and that all the debts existing against said deceased, or allowed by the court, pursuant to law, have been fully paid and satisfied, and that said estate has been fully administered, as by final account, of Leoria L. Twist, administratrix of said estate, duly audited and allowed by this court, pursuant to due notice given and [fol. 9] served, will appear, reference being had thereto, and that said estate is ready for distribution.

And it further appearing, that due notice of the application for this final decree in said matter assigning the estate to the persons thereto entitled by law, has been given and served pursuant to the law in such case made and now provided.

And it further appearing, that said deceased died intestate, and the residue of said estate, consists of the following described real estate, to wit: S. 2 of N. E. and N. E. of S. E. of S. E., Sec. 24, Township 20 North, Range 12 East, and the N. W. of S. W., of Sec. 19, Township 20 North, Range 13 East, and one horse of the value of $125.00.

And it further appearing to the court that the widow's dower has never been assigned to her by metes and bounds, and that said described lands has large quantities of oil therein, that there is a valid and subsisting oil and gas mining lease thereon and that same was executed before the death of said William G. Twist, and that the widow of said William G. Twist, deceased, is Leoria L. Twist, and that said widow, Leoria L. Twist, is entitled to all of the rents and profits from said described land up to the date

of the filing of her final report herein as administratrix of the said estate, and that by said final report said widow asks that she be allowed all of the said rents and profits up to the 15th day of April, 1910; and that after said date the rents and profits therein be divided as follows, to-wit: one third to said widow Leoria L. Twist, in lieu of her dower, and the remaining two thirds to the following named heirs of said William G. Twist, deceased, to-wit: Albert T. Twist, Jessie L. Twist, Edward C. Twist, Kuroki Twist and Willie V. Twist, sons and daughters of said William G. Twist, for the reason that said land will not admit of division as set forth in the final report herein.

It is therefore ordered, adjudged and decreed by the court that said Leoria L. Twist is to receive in lieu of her dower one third of the rents and profits of said described land, Albert T. Twist, 2 15, Jessie L. Twist 2 15, Edward C. Twist 2 15, Kuroki Twist 2 15, and Willie V. Twist 2 15 of the rents and profits of the said estate and remainder in fee to the said named heirs, their heirs and assigns forever.

Witness my hand and the seal of said court this 17th day of June, A. D., 1910.

(Signed) N. J. Gubser, Judge of the County Court.

[fol. 10] "Exhibit B" to Petition

Probate No. 168

In the Matter of the Guardianship of Albert T. Twist, Edward C. Twist, and Jessie L. Twist, Minors; Leoria L. Twist Weldy, Guardian.

Probate No. 167

In the Matter of the Estate of William C. Smith, Deceased; Leoria L. Twist Weldy, Administratrix.

Petition

Comes now Leoria L. Twist Weldy, and respectfully shows the court that she is the duly appointed, qualified and acting guardian of Albert T. Twist, Edward C. Twist,

and Jessie L. Twist, minors; and that she is the duly appointed, qualified and acting administratrix of the estate of William G. Twist, deceased; that the said guardianship and administration matters are at this time within the jurisdiction of this court.

Your petitioner states that heretofore, by due procedure of law, oil and gas leases were granted upon the lands of said minors and the said William G. Twist, deceased, as hereinafter appears; that said oil and gas leases are now in full force and effect and are held by the Los Angeles Cherokee Oil Company, a corporation, and are now in the course of development and are producing oil as herein set forth; that said leases were made at a time when the oil business within the state of Oklahoma was in its infancy and said leases were made for a definite period without proper regard for the interests of the lessor and lessee.

A description of said leases is here set forth, to-wit:

1. The estate of William G. Twist, deceased; Lot 3, S. 19, T. 20 N. R. 13 E., and N. 15.28 acres of Lot 7, Sec. 14, T. 20 N., R. 12 E., and S. 2 of N. E. 4 of S. E. 4 and N. E. 4 of S. E. 4 of S. E. 4 of Sec. 24, T. 20 N. R. 12 E., containing 80.69 acres, bearing date of September 30, 1904, and expiring September 28, 1919.

2. The lease of Albert T. Twist, covering the following described lands, to-wit: N. 2 of N. E. 4 of S. E. 4 and S. W. 4 of S. E. 4 of N. E. 4 of Sec. 24, Twp. 20 N., R. 12 East, containing 30 acres, more or less, bearing date of March 22, 1905, and expiring September 3rd, 1918.

3. The lease of Edward C. Twist, covering the following lands, to-wit: N. 2 of S. E. 4 of N. E. 4 and S. E. 4 of N. E. 4 of Sec. 24, T. 20 N., R. 12 E. containing 30 acres, more or less, bearing date of March 22, 1905, and expiring March 21, 1920.

4. The lease of Jessie L. Twist, covering the following described lands, to-wit: W. 2 of S. E. 4 of S. E. 4 and S. E. 4 of S. E. 4 of S. E. 4 of Sec. 24, T. 20 N., R. 12 E., and Lot 4 of Sec. 19 T. 20 N., R. 13 E., and S. 15.25 acres of lot 7, [fol. 11] Sec. 14, T. 20 N., R. 12 E., containing 80.69 acres, bearing date of March 22, 1905, and expiring December 7, 1918.

That all of said lands are located within Tulsa County, State of Oklahoma:

That said minors are children of your petitioner and William G. Twist, deceased; that your petitioner and the said three minors are the heirs of the said William G. Twist, and are the owners in fee of the estate of the lands above described as the estate of William G. Twist.

That the royalty accruing under the terms of the leases above set forth is ten (10%) per cent of the value of the crude oil from the premises.

In consideration of the extension of the term of each lease for a period so long as oil or gas shall be produced therefrom the Los Angeles Cherokee Oil Company, has offered to increase the royalty on each lease from ten per cent (10%) to tweanve and one-half (12½%) per cent, effective forthwith, and pay to your petitioner for the benefit of herself and the said three minors, as their interests in said lands may appear, and agreed amount of money.

Your petitioner is of the opinion that said proposition is beneficial and for the best interests of herself and said minors. Your petitioner is aware that the value of oil is fluctuation; that the amount of oil the land will produce is unknown; that the business of producing is attended by many hazards, and that the said sum of money in hand, within the immediate increase of royalty, is a certain profit which your petitioner believes it her duty, on behalf of said minors, to accept.

Your petitioner further shows that the leasehold described as the estate of William G. Twist, deceased, has produced for the months of February, March and April, a daily average of royalty of 8.53 barrels; that the Albert T. Twist lease has produced a daily average royalty for said period of 2.27 barrels; that the Edward C. Twist has produced for said period a daily average royalty of 2.45 barrels; that the Jessie L. Twist lease has produced for said period a daily average royalty of 3.95 barrels; that your petitioner believes it will be equitable to pro rate the same agreed sum of money on the daily average royalty for said three months of February, March and April, 1916.

Wherefore, your petitioner prays that she be permitted to enter into an agreement extending the term of each of said leases for a term so long as oil or gas shall be found thereon; that said agreement be confirmed and approved

by this court, and that said moneys be distributed as aforesaid.

(Signed) Leoria L. Twist Weldy, Petitioner.

[fol. 12] State of Oklahoma,
County of Tulsa, ss:

Leoria L. Twist Weldy, having first been duly sworn on her oath, says: That she is the petitioner in the above and foregoing petition; that she has read the same and that the matters and things therein stated are true and correct to the best of her knowledge and belief.

(Signed) John Schmitz.

Subscribed and sworn to before me this 3rd day of June, 1916. (Signed) John Schmitz, Notary Public. My commission expires February 9th, 1919. (Seal.)

Endorsements: County Court, State of Oklahoma, County of Tulsa, June 5, 1916. Filed. Frank Ingraham, Court Clerk.

"Exhibit C" to Petition

State of Oklahoma,
County of Tulsa, ss:

In the County Court

Probate No. 168

In the Matter of the Guardianship of Aubrey T. Twist, Edward C. Twist, and Jessie L. Twist, Minors; Leoria L. Twist Weldy, Guardian.

Probate No. 167

In the Matter of the Estate of William G. Twist, Deceased; Leoria L. Twist Weldy, Administratrix

Order Setting Date for Hearing Petition for Sale of Extension of Leases for Oil and Gas Mining Purposes

Now on this day of June, 1916, Leoria L. Twist Weldy, the duly appointed, qualified and acting guardian of the

estates of Albert T. Twist, Edward C. Twist and Jessie L. Twist, minors, and the duly appointed, qualified and acting administratrix of the estate of William G. Twist, deceased, having filed in this court her petition praying leave of court to extend the leases on the individual allotments of land of her said wards, and on the lands of William G. Twist, deceased, for which she is administratrix, for the benefit of said wards and for herself, for oil and gas purposes, from the date of expiration of the present lease on each of said tracts of land for a period so long as oil or gas shall be produced.

It is ordered, that said petition be and the same hereby is set for hearing on the 10th day of June, 1916, at 10:30 o'clock A. M., and that the notice thereof in three (3) different public places in said county, publication not being practicable.

(Signed) John R. Ramsey, County Judge.

Endorsed: County Court, State of Oklahoma, County of Tulsa, June 5, 1916. Filed. Frank Ingraham, Court Clerk.

[fol. 13] "Exhibit D" to Petition

State of Oklahoma,
County of Tulsa, ss:

In the County Court

Probate No. 168

In the Matter of the Guardianship of Albert T. Twist, Edward C. Twist, and Jessie L. Twist, Minors; Leoria L. Twist Welch, Guardian

Probate No. 167

In the Matter of the Estate of William G. Twist, Deceased; Leoria L. Twist Welch, Administratrix

Report and Return of Guardian and Administratrix on Sale of Extension of the Term of Oil and Gas Mining to Los Angeles Cherokee Oil Company.

Comes now Leoria L. Twist, the duly appointed, qualified and acting guardian of Albert T. Twist, Edward C.

Twist and Jessie L. Twist, minors, and administratrix, duly appointed, qualified and acting in such capacity, of the estate of William G. Twist, deceased, and reports to this Honorable Court that on the 16th day of June, 1916, as such guardian and administratrix she executed and delivered certain oil and gas mining leases covering the hereinafter described lands lying, being and situated in Tulsa County, State of Oklahoma, to the Los Angeles Cherokee Oil Company, a corporation of Los Angeles, California, and transacting business in Tulsa, Oklahoma, in accordance with the prior order of this court setting date for hearing of her petition for sale of said oil and gas leases covering said lands below described, said extension of the term of said oil and gas leases being from the date of expiration of each of said present leases for a period of so long as oil or gas shall be produced, said tracts being described as follows:

Oil and gas mining lease on the estate of William G. Twist, deceased, covering Lot 3 of Section 19, Township 20 North, Range 13 East, and the North 15.28 acres of Lot 7 of Section 14, Township 20 North, Range 12 East, and the South Half of the Northeast Quarter of Southeast Quarter and the Northeast Quarter of the Southeast Quarter of the Southeast Quarter of Section 24, Township 20 North, Range 12 East, containing 81.69 acres, extension of term beginning September 29, 1919.

Oil and gas mining lease of Albert T. Twist, a minor, covering the North half of the northeast quarter of the southeast quarter and the southwest quarter of the southeast quarter of the northeast quarter of Section 24, Township 20 North, Range 12 east, containing 30 acres, more or less, extension of term to begin September 3rd, 1918.

Oil and gas mining lease of Edward C. Twist, a minor, covering the north half of the southeast quarter of the [fol. 14] northeast quarter and the southeast quarter of the southeast quarter of the northeast quarter of Section 24, Township 20 North, Range 12 East, containing 30 acres, more or less, extension of term to begin March 21st, 1920.

Oil *Oil* and gas mining lease of Jessie L. Twist, a minor, covering the west half of the southeast quarter of the southeast quarter and the southeast quarter of the southeast quarter of the southeast quarter of Section 24, Town-

ship 20 North, Range 12 East, and Lot 4 of Section 19, Township 20 North, Range 13 East, and the south 15.25 acres of Lot 7 of Section 14, Township 20 North, Range 12 East, containing 80.69 acres, extension of term to begin December 7th, 1918.

For a total cash bonus of Eighteen Thousand and no/100 ($18,000.00) Dollars to her in hand paid by the Los Angeles-Cherokee Oil Company, a corporation, said amount to be pro rated according to certain agreements entered into between the said Los Angeles-Cherokee Oil Company, a corporation, in writing with the guardian and administratrix aforesaid and as in each of said agreements set out according to the average daily production of said oil and gas leases for the months of February, March and April, 1916, as a basis for computation of said royalty interests, and said agreement calling for an increase in the amount of royalty on each of the above described leases from ten (10%) per cent to twelve and one half (12½%) per cent of all the oil and gas produced and saved from said premises and each of the above described leaseholds, said extension agreement covering said oil and gas leases providing that the same shall be for a period from the date of the expiration of each of said present leases for so long as oil or gas shall be produced.

Dated this 16th day of June, 1916.

(Signed) Leoria L. Twist Weldy, Guardian of the Estate of Albert T. Twist, Edward G. Twist, and Jessie L. Twist, Minors; Administratrix of the Estate of William G. Twist, Deceased. (Signed) Leoria L. Twist Weldy, on her own behalf.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Leoria L. Twist Weldy, of lawful age, being first duly sworn on her oath deposes and says, that she is the legal guardian of the estates of Albert T. Twist, Edward G. Twist and Jessie L. Twist, minors, and is the legal administratrix of the estate of William G. Twist, deceased; [fol. 15] that she has read the above and foregoing return and report and that the facts therein stated are true.

(Signed) Leoria L. Twist Weldy.

Subscribed and sworn to before me this 16th day of June, 1916. (Signed), E. F. Gesten, Notary Public. My commission expires September 16, 1919. (Seal.)

Endorsement: County Court, State of Oklahoma, Tulsa County, June 17, 1916. Filed. Frank Ingraham, Court Clerk.

"Exhibit E" to Petition

State of Oklahoma,
County of Tulsa, ss:

In the County Court

Probate No. 168

In the Matter of the Guardianship of Albert T. Twist, Edward C. Twist, and Jessie L. Twist, Minors; Leoria L. Twist, Guardian.

Order

Now on the 16th day of June, 1916, the above matters coming on for hearing before the court, and the guardian appearing in person, and the Los Angeles Cherokee Oil Company, a corporation, appearing by its attorneys, Rice & Lyons; and it appearing that the guardian, Leoria L. Twist Weldy, has heretofore, on the 5th day of June, 1916, filed a petition praying for the extension of the term of certain oil and gas leases heretofore granted upon the lands of the minors above named, and the court having heard the petition, witnesses and statement of counsel, is advised in the premises and finds:

1. That due and proper notice of said hearing has been given.

2. That heretofore oil and gas leases were granted upon the lands of said minors, and the lands of said Twist, deceased; that said oil and gas leases are now in full force and effect and are held by the Los Angeles Cherokee Oil Company, a corporation, and are now in the course of de-

velopment and are producing oil; that said minors are the children of the petitioner, Leoria L. Twist Weldy, and William G. Twist, deceased; that said petitioner and the three minors are the sole heirs of the said William G. Twist, deceased; that the royalty accruing under the terms of the leases above set forth is ten (10%) per cent of the crude oil produced from the premises.

3. That the petitioner, for herself and as guardian and the said Los Angeles Cherokee Oil Company, have agreed that the term of each of said leases shall be extended for a period so long as oil or gas shall be produced therefrom, in consideration of the payment by the said company of the [fol. 16] sum of Eighteen Thousand ($18,000.00) Dollars in cash, and an increase of the royalty on each lease ten (10%) per cent to twelve and one-half (12½%) per cent, effective forthwith, and the drilling of a well on each of said tracts within 6 months from this date.

4. That the said guardian is satisfied that the said agreement is beneficial and for the best interests of the said minors.

5. The court finds that said proposition is beneficial and for the best interests of said minors and that the same should be approved;

6. That the method of distribution of the said sum of Eighteen Thousand ($18,000.00) Dollars as prayed for by the guardian is satisfactory.

Wherefore, it is Ordered, Considered and Adjudged, that the said guardian, Leoria L. Twist Weldy, be and she hereby is authorized in consideration of Eighteen Thousand ($18,000.00) Dollars in cash, an increase of the royalty from ten (10%) per cent to twelve and one-half (12½%) per cent and the drilling of a well on each of said tracts within six (6) months of date hereof, to enter into an agreement with the Los Angeles Cherokee Oil Company, a corporation, extending the terms of the following described leases, to-wit:

The estate of William G. Twist, deceased: Lot 3, Sec. 19, T. 20 N., R. 13 E., and N. 15.28 acres of Lot 7, Sec. 14, T. 20 N., R. 12 E., and S. 2 of N. E. 4 of S. E. 4 and N. E. 4 of

S. E. 4 of S. E. 4 of Sec. 24, T. 20 N., R. 12 E., containing 80.69 acres, bearing date of September 30, 1904.

The lease of Albert T. Twist, covering the following described lands, to-wit: N. 2 of N. E. 4 of S. E. 4 and S. W. 4 of S. E. 4 of N. E. 4 of Sec. 24, T. 20 N., R. 12 E., containing 30 acres, more or less, bearing date of March 22nd, 1905.

The lease of Edward C. Twist, covering the following described lands, to-wit: N. 2 *fo* S. E. 4 of N. E. 4 and S. E. 4 of S. E. 4 of N. E. 4 of Sec. 24, T. 20 N., R. 12 E., containing 30 acres, more or less, bearing date of March 22nd, 1905.

The lease of Jessie L. Twist, covering the following described lands, to-wit: W. 2 of S. E. 4 of S. E. 4 and S. E. 4 of S. E. 4 of Sec. 24, T. 20 N., R. 12 E., and Lot 4 of Sec. 19, T. 20 N., R. 13 E., and S. 15.25 acres of Lot 7 of Sec. 14, T. 20 N., R. 12 E., containing 80.69 acres, bearing date of March 22nd, 1905, for a term so long as oil or gas shall be produced therefrom.

It is further considered, ordered and adjudged that the court having examined said agreements extending the terms of said leases, does hereby approve and confirm the same, and does approve and confirm the extension of said leases for a term so long as oil or gas shall be found thereon.

[fol. 17] Witness the hand of the court this 16th day of June, A. D., 1916.

(Signed) John R. Ramsey, County Judge. (Seal.)

Endorsement: County Court, State of Oklahoma, County of Tulsa, June 17, 1916. Filed. Frank Ingraham, Court Clerk.

"Exhibit F" to Petition

State of Oklahoma,
County of Tulsa, ss:

In the County Court

Probate No. 168

In the Matter of the Guardianship of Kuroki Twist, a Minor, and Willie V. Twist, a Minor; Leoria L. Twist Weldy, Guardian.

Probate No. 168

In the Matter of the Estate of William G. Twist, Deceased; Leoria L. Twist Weldy, Administratrix

Petition

Comes now Leoria L. Twist Weldy and respectfully shows the court that she is the duly appointed, qualified and acting guardian of Kuroki Twist, a minor and Willie V. Twist, a minor, and that she is the duly appointed, qualified and acting administratrix of the estate of William G. Twist, deceased; that said guardianship and administration matters are at this time within the jurisdiction of this court.

Your petitioner states that William G. Twist, now deceased, made, executed and delivered in his life time an oil and gas mining lease to the Los Angeles-Cherokee Oil Company, a corporation, covering the hereinafter described premises; that in the course of development and producing oil; that on June 5th, 1916, your petitioner filed a petition as administratrix of the estate of William G. Twist, deceased, and as guardian of Albert T. Twist, Edward C. Twist, *deceased, and as guardian of Albert T. Twist, Edward C. Twist*, and Jessie L. Twist, minors, asking for authority to execute a stipulation extending the terms of said lease for as long as oil or gas is found, said petition being on file in Probate No. 168, and Probate No. 167 of the files of this court and being hereby specifically referred to and made a part hereof;

That in said petition and in the proceedings had thereon it is set forth that said Leoria L. Twist Weldy, said Albert

Twist, Edward C. Twist, and Jessie L. Twist, were the sole heirs of William G. Twist, deceased, and the owners in fee of said estate of William G. Twist, deceased, described in said petition said lands being described as follows:

Lot 3, S. 19, T. 20 N., R. 13 E., & N. 15.28 acres of Lot 7, Sec. 14, T. 20 N., R. 12 E., and S. 2 of N. E. 4 of S. E. 4 and N. E. 4 of S. E. 4 of S. E. 4 of Sec. 24, T. 20 N., R. 12 E., and containing 80.69 acres.

[fol. 18] That pursuant to said petition, at a public sale held after due notice, said Los Angeles Cherokee Oil Company, purchased an extension of its oil and gas mining lease on said premises, for as long as oil or gas is found, for the sum of approximately $8,926.74, together with increase in the royalty from ten per cent (10%) to twelve and one-half per cent (12½%) effective on June 17, 1916, and the further agreement to drill a well on said tract.

That said order reads as follows:

Wherefore, it is ordered, considered and adjudged, that the said guardian, Leoria L. Twist Weldy, be and she hereby is authorized, in consideration of the sum of Eighteen Thousand ($18,000.00) Dollars in cash, and increase of the royalty from ten per cent (10%) to twelve and one-half per cent (12½%) and the drilling of a well on each of said tracts within six (6) months of date hereof, to enter into an agreement with the Los Angeles Cherokee Oil Company, a corporation, extending the terms of the following described leases, to wit:

"The estate of William G. Twist, deceased:

Lot 3, Sec. 19, T. 20 N., R. 13 E., and N. 15.28 acres of Lot 7, Sec. 14, 20 N., R. 12 E., and S. 2 of N. E. 4 of S. E. 4 and N. E. 4 of S. E. 4 of S. E. 4 of Sec. 24, T. 20 N., R. 12 E., containing 80.69 acres, baring date of September 30, 1904.

"The lease of Albert T. Twist, covering the following described lands, to wit:

N. 2 of N. E. 4 of S. E. 4 and S. W. 4 of S. E. 4 of N. E. 4 of Sec. 24, T. 20 N., R. 12 E., containing 30 acres, more or less, bearing date of March 22nd, 1905.

"The lease of Edward C. Twist, covering the following described lands, to-wit:

N. 2 of S. E. 4 of N. E. 4 and S. E. 4 of S. E. 4 of N. E. 4 of Sec. 24, T. 20 N., R. 12 E., containing 30 acres, more or less, bearing date of March 22nd, 1905.

"The lease of Jessie L. Twist, covering the following described lands, to-wit:

W. 2 of S. E. 4 of S. E. 4 and S. E. 4 of S. E. 4 of S. E. 4 of Sec. 24, T. 20 N., R. 12 E., and Lot 4 of Sec. 19, T. 20 N., R. 13 E., and S. 15.25 acres of Lot 7 of Sec. 14, T. 20 N., R. 12 E., containing 80.69 acres, bearing date of March 22nd, 1905.

for a term so long as oil or gas shall be produced therefrom."

That pursuant to the terms thereof and pursuant to the method of distribution of said sum of $18,000.00 therein re-
[fol. 19] ferred to, said sum of $8,926.74 was paid to the estate of William G. Twist and is now held by said Leoria L. Twist Weldy for the benefit of the heirs of said William G. Twist.

That the allegations of the petition and order in said proceedings herein referred to are erroneous in that said Kuroki Twist, and Willie V. Twist, minors, are children of William G. Twist, deceased, and for this petitioner; that said Kuroki Twist and Willie V. Twist, minors, are entitled to participate and are now participating in the consideration paid by said Los Angeles Cherokee Oil Company, a corporation, for said extension of lease, and are each entitled to, and are receiving, an equal amount of the said consideration together with said Albert T. Twist, Edward C. Twist and Jesse L. Twist, minors; that your petitioner did not join in said stipulation as guardian of Kuroki Twist and Willie V. Twist, minors; that said omission was due to inadvertance; that a good and valuable consideration for such stipulation has been paid and is now in the hands of your petitioner for the benefit of said minors; that it is beneficial and for the best interests of the estates of each of said minors to permit petitioner to execute said stipula-

tion as guardian of said minors, said increase of royalty to be effective June 17, 1916.

Wherefore, petitioner prays that she be authorized to make, execute and deliver as guardian of said Kuroki Twist and Willie V. Twist, minors, a stipulation identical in form and substance with said stipulation executed on June 17th, 1916, the consideration for same having been received on said date and now being held by petitioner for the benefit of the estates of said Kuroki Twist and Willie V. Twist, minors.

(Signed) Leoria L. Twist Weldy, Petitioner.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Leoria L. Twist Weldy, having first been duly sworn, on her oath says, that she is the petitioner in the above and foregoing petition; that she has read the same and that the matters and things therein stated are true and correct to the best of her knowledge and belief.

(Signed) Leoria L. Twist Weldy.

Subscribed and sworn to before me this 13th day of March, 1917. (Signed) H. L. Standeven, County Judge. (Seal.)

Endorsed: County Court, State of Oklahoma, County of Tulsa, March 31, 1917. Filed. Frank Ingraham, Court Clerk.

[fol. 20] "Exhibit G" to Petition

State of Oklahoma,
County of Tulsa, ss:

In the County Court

Probate No. 168

In the Matter of the Guardianship of Kuroki Twist, a Minor, and Willie V. Twist, a Minor; Leoria L. Twist Weldy, Guardian

Probate No. 168

In the Matter of the Estate of William G. Twist, Deceased; Leoria L. Twist Weldy, Administratrix

Now, on this 13th day of March, 1917, the petition of Leoria L. Twist Weldy as guardian of Willie V. Twist, and Kuroki Twist, minors, having come on for hearing, and the court being advised in the premised and having heard the evidence;

And it appearing that the Honorable John P. Boyd, United States Probate Attorney, has waived advertisement in said proceedings for the reasons set out in the written waiver which is hereby referred to and made a part of this order; and,

It appearing that the allegations of the petition of said guardian are true.

Now, therefore, it is ordered, considered, and adjudged that said Leoria L. Twist Weldy be and she hereby is authorized to execute an extension of oil and gas mining lease as guardian of Kuroki Twist and Willie V. Twist, minors, covering the estate of William G. Twist, deceased, described as follows:

Lot Three of Section 19, Township 20 North Range 13 East, the North 15.28 acres of Lot Seven, Section 14, Township 20 North, Range 12 East; the South Half of the Northeast Quarter of the Southeast Quarter of the Southeast Quarter of Section 24, Township 20 North, Range 12 East, of the Indian Base and Meridian, containing 80.69 acres, more or less, situated in Tulsa County, Okla.,

the consideration for said extension having been paid after the sale in open court on June 17, 1916, to said Leoria L. Twist Weldy, for the benefit of the estate of said William G. Twist, deceased.

It is further ordered, considered and adjudged that said guardian file a report and return of proceedings hereunder.

(Signed) H. L. Standeven, Judge. (Seal.)

Endorsements: County Court, State of Oklahoma, County of Tulsa, March 13, 1917. Filed. Frank Ingraham, Court Clerk.

[fol. 21] "Exhibit H" to Petition

State of Oklahoma,
County of Tulsa, ss:

In the County Court

Probate No. 168

In the Matter of the Guardianship of Kuroki Twist, a Minor, and Willie V. Twist, a Minor; Leoria L. Twist Weldy, Guardian

Probate No. 167

In the Matter of the Estate of William G. Twist, deceased; Leoria L. Twist Weldy, Administratrix

Report

Comes now Leoria L. Twist Weldy, guardian of Kuroki Twist, a minor, and Willie V. Twist, a minor, and shows the court that pursuant to the order of the County Court of Tulsa County, Oklahoma, made, on the 13th day of March, 1917, she executed a certain stipulation extending the term of lease to the Los Angeles Cherokee Oil Company, a corporation, said stipulation being attached hereto and made a part hereof.

Said guardian prays that said stipulation be in all things approved and that she be directed as guardian and as administratrix of the estate of William G. Twist, deceased, to apply the proceeds of said sale of June 17, 1916, for the

benefit of all the heirs of said William G. Twist, deceased, until further orders of this court.

(Signed) Leoria L. Twist Weldy, Guardian.

Endorsements: County Court, State of Oklahoma, County of Tulsa, March 13, 1917. Files. Frank Ingraham, Court Clerk.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Leoria L. Twist Weldy, of lawful age, being first duly sworn, on her oath deposes and says, that she is the legal guardian of Willia V. Twist and Kuroki Twist, minors, and is the legal administratrix of the estate of William G. Twist, deceased; that she has read the above and foregoing return and report and that the facts therein stated are true.

(Signed) Leoria L. Twist Weldy.

Subscribed and sworn to before me this 13th day of March, 1917. (Signed) H. L. Standeven, County Judge. (Seal.)

"EXHIBIT 1" TO PETITION

STATE OF OKLAHOMA,
County of Tulsa, ss:

IN THE COUNTY COURT

Probate No. 168

In the Matter of the Guardianship of KUROKI TWIST, a Minor, and WILLIA V. TWIST, a Minor; LEORIA L. TWIST WELDY, Guardian

[fol. 22] Probate No. 167

In the Matter of the Estate of WILLIAM G. TWIST, deceased; LEORIA L. TWIST WELDY, Administratrix

Order of Confirmation

Now on this 13th day of March, 1917, the above matter coming on for hearing before the Court, and the guardian

and administratrix appearing in person, and the Los Angeles Cherokee Oil Company, a corporation, appearing by its attorneys, Rice & Lyon, and it appearing that heretofore your petitioner filed a petition praying for authority to enter into a stipulation with said corporation as prayed for in said petition, and the court having heard the petition, witnesses and statement of counsel, is advised in the premises, and finds:

First. That all notice of publication and posting has been duly waived, in writing, by the Hon. John P. Boyd, United States Probate Attorney, as appears more fully in the waiver of advertisement and notice on file in this office.

Second. That heretofore, on the 17th day of June, 1916, said guardian and administratrix entered into a stipulation with said corporation modifying the terms of a certain oil and gas mining lease upon the hereinafter described lands, and executed the same as such administratrix, and as the guardian of Albert T. Twist, Edward C. Twist and Jessie L. Twist, minors, in consideration of the sum of Eighteen Thousand Dollars, ($18,000.00) duly paid, in consideration of which said oil and gas mining lease was extended for period so long as oil or gas is found in paying quantities, and as an additional consideration for such extension the royalty on oil produced from said premises from ten per cent to twelve and one half per cent and said corporation agreed to drill an additional well thereon within six months from said date.

Third. That it appears from the petition filed in connection therewith, that said Leoria L. Twist Weldy, Albert T. Twist, Edward C. Twist and Jessie L. Twist are shown to be the only heirs of said William G. Twist; that in truth and fact, Kuroki Twist and Willie V. Twist, minor children of said Leoria L. Twist Weldy, and William G. Twist, deceased, should have joined in said proceedings; that said minor children, have participated and are now participating in the consideration paid by said Los Angeles Cherokee Oil Company for said extension of lease, and that each of them are entitled to, and are receiving an equal amount of said consideration together with said other heirs; that this petitioner did not join in said stipulation as guardian of said Kuroki Twist and Willie V. Twist through inadver-

tance; that a good and valuable consideration for such stipulation has been paid and is now in the hands of the petitioner for the benefit of said minors, and that it is beneficial and for the best interests of the estates of each [fol. 23] of said minors to permit said petitioner to execute said stipulation as guardian of said minors.

Wherefore it is ordered, considered and adjudged that said guardian be, and she hereby is, authorized and directed to make, execute and deliver, as guardian of said Kuroki Twist and Willie V. Twist, a stipulation identical in form and substance with said stipulation executed on June 17, 1916, the consideration for same having been received on said date and now being held by the said guardian for the benefit of the estates of said minors, and that no further or other consideration is required to be paid by said Los Angeles Cherokee Oil Company, to said guardian or to said minors.

It is further ordered, considered and adjudged that the court, having examined said stipulation, does hereby approve and confirm the same, and has further endorsed its approval thereon.

The premises herein referred to being described as follows, to-wit:

Lot Three (3) of Section Nineteen (19), Township Twenty (20) North, Range Thirteen (13) East, the North Fifteen and 28/100 acres of Lot Seven (7) of Section Fourteen (14), Township Twenty (20) North, Range Twelve (12) East; the South Half (S. 2) of the Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) and the Northeast Quarter (N. E. 4) and the Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) of the Southeast Quarter (S. E. 4) of Section Twenty four (24), Township Twenty (20) North, Range Twelve (12) East, containing 80.69 acres, more or less, in Tulsa County, Oklahoma.

Witness, the hand and seal of the court this 13th day of March, 1917.

(Signed) H. L. Standeven, County Judge. (Seal.)

Endorsements: County Court, State of Oklahoma, County of Tulsa, March 13, 1917. Filed. Frank Ingraham, Court Clerk.

"Exhibit J" to Petition

Agreement Extending Term of Lease

This agreement, made this 16th day of June, 1916, by and between Albert T. Twist, a minor, by his guardian, Leoria L. Twist Weldy, Edward C. Twist, a minor, by his guardian, Leoria L. Twist Weldy, Jessie L. Twist, a minor, by her guardian, Leoria L. Twist Weldy, Leoria L. Twist Weldy in her own behalf and A. D. Weldy, husband of [fol. 24] Leoria L. Twist Weldy, parties of the first part and the Los Angeles Cherokee Oil Company, a corporation, of Los Angeles, California, and transacting business at Tulsa, Oklahoma, party of the second part, Witnesseth:

That whereas, heretofore, on the 30th day of September, 1904, William G. Twist made, executed and delivered to the Los Angeles Cherokee Oil Company, a corporation, an oil and gas mining lease covering the following described lands, to-wit:

Lot Three (3) of Section Nineteen (19), Township Twenty (20) North, Range Thirteen (13) East; the North 15.28 acres of Lot Seven (7), Section Fourteen (14) Township Twenty (20) North, Range Twelve (12) East; the South Half (S. 2) of the Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) and the Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) of the Southeast Quarter (S. E. 4) of Section Twenty four (24), Township Twenty (20) North, Range Twelve (12) East, of the Indian Meridian, containing 80.69 acres, more or less,

situated in Tulsa County, State of Oklahoma, for a term of fifteen (15) years, and

Whereas, the said William G. Twist is dead, and left surviving him, as his sole heirs, the said Leoria L. Twist Weldy, his widow, and the said Albert T. Twist, Edward C. Twist and Jessie L. Twist, his minor children by the said Leoria L. Twist Weldy, and

Whereas, Leoria L. Twist Weldy, is now the duly appointed, qualified and acting guardian of said minors, and has secured the authority of the County Court of Tulsa County, Oklahoma, the court having jurisdiction of the

guardianship proceedings, to enter into this agreement on behalf of said minors;

Now, therefore, in the consideration of the sum of Eight Thousand Nine Hundred Twenty-six and 74/100 ($8,926.74) Dollars, in hand paid, receipt of which is hereby acknowledged to be distributed to the said Leoria L. Twist Weldy, A. D. Weldy and to the said minors, Albert T. Twist, Edward C. Twist and Jessie L. Twist, as their interest may appear in said above described lands, and as a further consideration, an increase in the amount of royalty accruing to the fee owners under said above described lease from ten (10%) per cent to twelve and one-half (12½%) per cent, and the drilling of a well on said tract within six (6) months from this date, it is agreed that the term of said lease shall be and is hereby extended for a period so long as oil and gas shall be produced from said land, and the provision in said lease providing for a royalty of ten (10%) per cent of the value on the leased premises of all crude oil extracted [fol. 25] from the said lands, be and the same is hereby, as of this date, increased to the amount of twelve and one-half (12½%) per cent of the value on the leased premises of all crude oil extracted from said lands.

It is understood that the remaining provisions of said lease are unchanged and shall remain in full force and effect for a period so long as oil or gas is produced on said premises.

(Signed) Leoria L. Twist Weldy, Guardian of Albert T. Twist, Edward C. Twist, and Jessie L. Twist, Minors. Leoria L. Twist Weldy, on her own behalf. A. D. Weldy, Husband of Leoria L. Twist Weldy, Parties of the First Part. Los Angeles Cherokee Oil Company, by Dan Murphy, President, Party of the Second Part.

Attest: G. H. Murphy, Jr. Secretary. (Corp. Seal.)

State of Oklahoma,
County of Tulsa, ss:

Before me, the undersigned, a notary public in and for the said county and state, on this 17 day of June, 1916 personally appeared Leoria L. Twist Weldy, and A. D. Weldy, her husband, to me known to be the identical persons who

executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth. E. F. Gester, Notary Public. My commission expires September 16, 1919. (Seal.)

State of Oklahoma,
County of Tulsa, ss:

Before me, the undersigned, a notary public in and for the said county and state, on this 17th day of June, 1916, personally appeared Leoria L. Twist Weldy, guardian of Albert T. Twist, Edward C. Twist and Jessie L. Twist, minors, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth and as her free and voluntary act and deed in the capacity therein stated. (Signed) E. F. Gester, Notary Public. My commission expires September 16, 1919. (Seal.)

State of Oklahoma,
County of Tulsa, ss:

Before me, the undersigned, a notary public in and for said county and state, on this 22nd day of June, 1916, per-
[fol. 26] sonally appeared Dan Murphy to me known to be the identical person who subscribed the name of the maker hereof to the foregoing instrument as its president and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation for the uses and purposes therein set forth.

(Signed) H. O. Smyser, Notary Pub. My commission expires June 4, 1917. (Seal.)

State of Oklahoma,
County of Tulsa, ss:

The extension of the term of the lease herein described for a period so long as oil or gas is found thereon is approved and confirmed in open court, this 16th day of June, 1916.

(Signed) John R. Ramsey, County Judge.

Filed for record Tulsa County, Okahoma, June 30, 1916, at 11:15 A. M. (Signed) Lewis Cline, County Clerk. (Seal.)

EXHIBIT "L" TO PETITION

STATE OF OKLAHOMA,
County of Tulsa, ss:

IN THE COUNTY COURT

Probate No. 168

In the Matter of the Guardianship of ALBERT T. TWIST, EDWARD C. TWIST, and JESSIE L. TWIST, Minors: LEORIA L. TWIST WELDY, Guardian.

Probate No. 167

In the Matter of the Estate of WILLIAM G. TWIST, Deceased; LEORIA L. TWIST WELDY, ADMINISTRATRIX

Notice of the Sale of Extension of Oil & Gas Leases

Notice is hereby given in pursuance of an order of the County Court of the County of Tulsa, State of Oklahoma, made on the 5th day of June, 1916, the undersigned, guardian of the estate of Albert T. Twist, Edward C. Twist and Jessie L. Twist, minors; and as administratrix of the estate of William G. Twist, deceased, will sell at public sale to the highest bidder, subject to confirmation by said court, on Friday, the 16th day of June, 1916, at 10:30 o'clock A. M. in the County Court room in the city of Tulsa, Oklahoma, an extension of an oil and gas mining lease, now covering the following described tracts of land in Tulsa County, State of Oklahoma, to wit:

Lease on the estate of William G. Twist, deceased, covering Lot 3 of Section 19, Township 20 North, Range 13 East, and North 15.28 acres of Lot 7 of Section 14, Township 20 North, Range 12 East; and South Half of Northeast Quarter of Southeast Quarter and Northeast Quarter of Southeast of Quarter of Southeast Quarter of Section 24, Township 20 North, Range 12 East, containing 80.69 acres, extension of term to begin September 29, 1919.

[fol. 27] Lease of Albert T. Twist, a minor, on North Half of Northeast Quarter of Southeast Quarter and Southwest Quarter of Southeast Quarter of Northeast Quarter of Section 24, Township 20 North, Range 12 East, containing 30 acres, more or less, to begin September 3rd, 1918.

Lease of Edward C. Twist, a minor, on north half of southeast quarter of northeast quarter and southeast quarter of southeast quarter of northeast quarter of Section 24, Township 20 North, Range 12 East, to begin March 21st, 1920.

Lease of Jessie L. Twist, a minor, on west half of southeast of southeast quarter and southeast quarter of southeast quarter of southeast quarter of Section 24, Township 20 North, Range 13 East; and the south 15.25 acres of Lot 7 of Section 14, Township 20 North, Range 12 East, containing 80.69 acres, more or less, extension of term to begin December 7, 1918, at which time and at said place any person may appear to contest the sale of such extension or show cause why said lease or leases should not be extended from the date of the expiration of the present lease and leases for a period of so long *ad* oil or gas may or shall be produced from each and all of said leaseholds for oil and gas and the lands above described, and if any objections there be same to be filed in writing at the same time and place.

Said extension of said oil and gas leases now covering said lands will be sold on the following terms and conditions, to-wit: A bonus in cash, payment upon confirmation of sale of said leases covering said lands by the court.

Dated this 5th day of June, 1916.

Leoria L. Twist Weldy, Guardian of the Estates of Albert T. Twist, Edward C. Twist, and Jessie L. Twist, Minors, and Administratrix of the Estate of William G. Twist, Deceased.

Endorsements: County Court, State of Oklahoma, County of Tulsa, June 5, 1916. Filed. Frank Ingraham, County Clerk.

STATE OF OKLAHOMA,
County of Tulsa, ss:

IN THE COUNTY COURT

Probate No. 168

In the Matter of the Guardianship of ALBERT T. TWIST, EDWARD C. TWIST, and JESSIE L. TWIST, Minors; LEORIA L. TWIST WELDY, Guardian.

Probate No. 167

In the Matter of the Estate of WILLIAM G. TWIST, Deceased; LEORIA L. TWIST WELDY, Administratrix

[fol. 28] Proof of Posting

L. G. Livesay, of lawful age, a resident of Tulsa, Tulsa County, Okla., being first duly sworn on his oath deposes and says: That he is not in any manner interested in the sale of the extension of any lease or leases for oil and gas mining purposes covering the lands described in the attached notice; that on the 5th day of June, 1916, pursuant to an order in the above matters duly signed by the County Judge of the County Court of Tulsa County, Oklahoma, he posted a notice in three (3) different public places in Tulsa, Tulsa County, Oklahoma, a true and correct copy of which notices is hereto annexed, said notices being posted in the following places:

One on the bulletin board in the front of the Tulsa County Court House in Tulsa, Oklahoma.

One on a telephone pole at the northwest (N. W.) corner of Fifth and Main Streets, in Tulsa, Oklahoma.

One on a telephone poje in front of the post office on Fourth Street between Main Street and Boston Avenue, in Tulsa, Okahoma.

Dated this 5th day of June, 1916.

(Signed) G. L. Livesay.

Subscribed and sworn to before me this 5th day of June, 1916. E. F. Gesten, Notary Public. My commission expires Sept. 16, 1919. (Seal.)

(The foregoing exhibits are attached to the petition and which said petition is endorsed:) District Court, State of Oklahoma, County of Tulsa. Filed Aug. 3, 1922. Frances Harvey, Court Clerk.

[File endorsement omitted.]

[Title omitted]

In United States District Court

Answer—Filed September 27, 1922

Comes now the defendant, Prairie Oil & Gas Company, and for its answer to the petition of the plaintiffs, alleges and says:

That the allegations of said petition do not state facts sufficient in law or in equity, to entitle the plaintiffs to the relief prayed for, or to any relief.

The defendant admits the execution of the lease to the Los Angeles Cherokee Oil Company, set forth in the plain- [fol. 29] tiff's petition, and admits the assignment thereof, after its modification and extension, as alleged in said petition, by said Los Angeles Cherokee Oil Company to this defendant, which assignment, it alleges, was made and executed March 5, 1917, but denies that said lease is not a present, valid and subsisting lease for a term so long as oil or gas is found upon the land covered thereby.

It admits that proceedings were had in the County Court of Tulsa County, Oklahoma, as set forth in said petition, but as to whether the said Los Angeles Cherokee Oil Company caused said proceedings to be instituted, this defendant has no knowledge, and therefore denies the same, and this defendant also denies that the said proceedings for a modification and extension of said lease, and the said orders of the Court and the acts of the said Leoria L. Twist Weldy thereunder conferred no rights to the oil and gas under the lands covered by said lease beyond the original term thereof, as averred in said petition.

This defendant denies that the modification and extension of said lease was procured by the fraud of the Los

Angeles-Cherokee Oil Company, but as to whether the said Los Angeles-Cherokee Oil Company made the statements, suggestions and misrepresentations alleged and set forth in said petition and as to whether the agreement between the said Leoria L. Twist Weldy and the said Los Angeles-Cherokee Oil Company directed and authorized by the County Court of Tulsa County, was the result of a prior understanding between the said Leoria L. Twist Weldy and the said Los Angeles-Cherokee Oil Company, this defendant is without knowledge, but avers that if said statements, suggestions and representations were made, the same were insufficient in law to constitute fraud.

This defendant further answering, admits that on the 5th day of June, 1916, the said Leoria L. Twist Weldy, as guardian of the minor plaintiffs, and *as* administratrix of the estate of William G. Twist, deceased, filed her petition in the County Court of Tulsa County, Oklahoma, as alleged in said petition, and in this connection the defendant alleges and shows to the Court that the said petition was set for hearing by the Court and the petitioner therein was required, by order of the Court, made on June 5, 1916, to give notice of her said application by posting the same in three (3) public places in said Tulsa County; that there was posted in Tulsa County, in three (3) public places therein, one being on the door of the court house in the City of Tulsa, in said County, a notice that in pursuance of an order of said County Court, the said Leoria L. Twist Weldy, as [fol. 30] guardian of Edward C. Twist, Albert T. Twist and Jennie L. Twist, and as administratrix of the estate William G. Twist, deceased, would sell to the highest bidder, subject to confirmation by the court, on Friday, June 16, 1916, in the County Court room in the City of Tulsa, Oklahoma, an extension of said oil and gas lease, for a bonus in cash, payable upon confirmation of the sale; a copy of which notice, with proof of posting, being attached to the plaintiffs' petition.

That the Los Angeles-Cherokee Oil Company offered to pay for a modification and extension of said lease, the sum of Eight Thousand, Nine Hundred, Twenty-six and 74/100 Dollars ($8,926.74), and also agreed to increase the royalty prescribed in said lease from ten (10) per cent to twelve and a half (12½) per cent, and to drill a well upon said land

within six (6) months from the date of the acceptance of said offer and its confirmation by said court; that on the 16th day of June, 1916, the said County Court approved said offer and did thereupon authorize and direct the guardian to enter into a stipulation or agreement, extending the term of said lease for a period continuing so long as oil or gas should be found in said land, with which order and direction, the guardian duly complied, and the stipulation and agreement so entered into was approved and confirmed by the Court, by its order as set forth in plaintiff's petition and the exhibits thereto.

That afterwards, as alleged in said petition, the said Leoria L. Twist Weldy filed in said County Court, her petition as guardian of Kuroki Twist and Willie V. Twist, alleging them to be the children of William G. Twist, deceased, and entitled to inherit a portion of his estate, and asking authority, on their behalf, to modify said lease, and to join in the agreement entered into with the Los Angeles-Cherokee Oil Company in her own behalf and as guardian of Albert T. Twist, Jessie L. Twist and Edward C. Twist.

That upon the same day, the said County Court upon its appearing to it that the United States Probate Attorney had waived notice of hearing, made an order authorizing the guardian to execute a modification of said lease on behalf of her said wards, Kuroki Twist and Willie V. Twist, and to join in the agreement heretofore executed by her with the said Los Angeles-Cherokee Oil Company, and that she thereupon did execute and join in such agreement, and which was, by the Court ratified and approved; all of which appears by the petition of the plaintiffs and the exhibits thereto.

Further answering, this defendant says that under its assignment of said lease from the Los Angeles-Cherokee Oil Company, it has taken possession of the lands [fol. 31] covered thereby, and admits that it has been operating the same and removing the oil and gas therefrom, but denies that it has taken oil and gas of the value set forth in the plaintiff's petition, and in this connection alleges and says that whether or not the modification and extension of said lease, is or was valid and binding upon the plaintiffs, this defendant, since it became the owner

of said modified and extended lease under its said assignment, has developed and operated the lands at its own expense, in good faith, and in the belief that it had a legal right so to do, and that if the Court should adjudicate and determine that said extension of the term of said lease was ineffective, the plaintiff is entitled only to the value of the oil and gas in place, and not its value after the same has been extracted from the land.

This defendant, further answering, says that since the plaintiffs, Albert T. Twist and Jessie L. Twist, have reached their majority, there has been paid to them, and each of them, and they have accepted, their share of the royalties due and accruing under said lease, as modified and extended, and now retain the same, whereby they have ratified, confirmed, and adopted said agreement of modification and extension, and are now estopped to deny the same.

This defendant, further answering, says that at the time of its purchase of the assignment of said lease from the Los Angeles Cherokee Oil Company, to-wit, on March 5, 1917, it paid to the said Los Angeles Cherokee Oil Company, more than One Thousand Dollars ($1,000.00); that said consideration was bona fide and actually paid; that at the time of paying the consideration for such assignment and transfer, and at the time of the delivery thereof, this defendant had no notice or knowledg of the various transactions and representations alleged and set forth in plaintiffs' petition between its assignor and the plaintiffs' guardian, and had no notice or knowledge of any proceedings or transactions relative to the modification and extension of said lease other than as shown by the records of the proceedings in the County Court of Tulsa County, Oklahoma, but avers that its purchase of said lease, and the payment of the consideration therefor, was in reliance upon the apparent legal title of the said Los Angeles Cherokee Oil Company, as shown by the public records.

Wherefore, the defendant prays:

1. That after due and proper hearing, the plaintiff's petition be dismissed for want of equity.

2. That the Court, by its decree, declare and determine that the defendant's title to said oil and gas lease, as modified and extended, is good, valid and subsisting as against

[fol. 32] and claim of the plaintiff, and that its title thereto be quieted as against said claims.

T. J. Flannelly, Paul B. Mason, West, Sherman, Davidson and Moore, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Reply—Filed November 4, 1922

Replying to the Answer of the defendant herein filed, the plaintiffs allege:

(1) They deny that the assignment of the lease in controversy from the Los Angeles Cherokee Oil Company to the defendant, was executed March 5, 1917; but allege that, in truth and in fact, the defendant and the Los Angeles Cherokee Oil Company agreed and contracted for the sale of said property prior to the date when the County Court attempted to approve the stipulation involved herein; and deny that the defendant is a purchaser in good faith of the said assignment from the Los Angeles-Cherokee Oil Company, and deny that they had no notice of the matters and things pertaining to the fraud practiced upon the guardian of the minor wards herein.

(2) Plaintiffs further admit that the said Leoria L. Twist Weldy, guardian, did file in the County Court her petition as guardian of Kuroki Twist and Willie V. Twist, asking for authority on their behalf to modify the lease theretofore entered into with the Los Angeles Cherokee Oil Company, and that, upon the same day, the County Court, without notice, entered an order authorizing the guardian to execute a modifying stipulation of said lease on behalf of said minor wards. And plaintiffs aver that said order was beyond the jurisdiction of the said court to enter, that it was without any consideration whatever moving to the said wards Kuroki Twist and Willie V. Twist; that the said order was entered without observation of Rule 9 of the Supreme Court of the State of Oklahoma, theretofore promulgated for the protection of minors and their estates, as referred to in the petition herein.

(3) Plaintiffs admit that the plaintiffs Albert T. Twist and Jessie L. Twist have arrived at their majority, and [fol. 33] have, since arriving at their majority, accepted from time to time one-eighth (1/8) of the oil run by the defendant, which said sums were voluntarily paid by the defendant to the said plaintiffs, but deny that they have ever ratified, confirmed or adopted said agreement of modification and extension, and deny that they are now estopped to assert the invalidity of said extension agreement.

(4) Further replying, plaintiffs aver that, at the date of the execution of said extension agreement referred to, to-wit: on the 16th day of June, 1916, the property involved herein was producing oil and gas; that the modification or extension of any lease thereon was, at said date, not of the nature of a chattel real, but that the effect and purpose of the extension agreement so executed was to sell and convey a known and described portion of the corpus of the real estate belonging to the minor wards under the jurisdiction of said County Court of Tulsa County; that the said extension constituted a sale in futuro of the seven-eighths (7/8) of the oil and gas in place; and, as such sale of real estate, was without any attempt to comply with the laws of the State of Oklahoma relating to the sale of real estate of minors and without any petition alleging grounds sufficient to give the said County Court jurisdiction to sell the real estate of minors, the said sale of a modification or extension of said lease is wholly and utterly void and of no force and effect, and the Court had no jurisdiction to order the sale thereof.

Wherefore plaintiffs pray judgment of this Court.

Jas. S. Watson, Linebaugh & Pinson, Attorneys for Plaintiffs.

[File endorsement omitted.]

In United States District Court

Decree—Filed May 24, 1923

Be it remembered that this cause came on to be heard at a former term of this Court and was argued by counsel and taken under advisement by the Court.

Now, this 27th day of April, 1923, this cause came on for further hearing, and it appearing that the plaintiff Edward C. Twist has since the former hearing become of legal age, he is substituted as party plaintiff.

And the Court now being fully advised in the premises, finds the issues, and concludes, in favor of the defendant as to all the plaintiffs except Kuroki Twist and Willie V. [fol. 34] Twist. It is, therefore, ordered, adjudged and decreed that defendant is the owner of an oil and gas mining lease covering an undivided eleven fifteenths (11/15) interest in the following lands, to wit:

Lot Three (3), Section Nineteen (19), Township Twenty (20) North, Range Thirteen (13) East; the North 15.28 acres of Lot Seven (7), Section Fourteen (14), Township Twenty (20) North, Range Twelve (12) East; the South Half (S. 2) of the Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) and the Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) of the Southeast Quarter (S. E. 4) of Section Twenty four (24), Township Twenty (20) North, Range Twelve (12) East, in Tulsa County, Oklahoma;

extending for a period so long as oil or gas is produced from said lands, and that its title thereto is hereby quieted and confirmed against the claims of the plaintiffs, to all of which the plaintiffs except, which exceptions are allowed, and in open court give notice of appeal.

It is further ordered, adjudged and decreed that the plaintiffs Kuroki Twist and Willie V. Twist are the owners of an undivided four fifteenths (4/15) interest in said lands, and that their title to said Four fifteenths (4/15) interest is hereby quieted and confirmed against the claims of the defendant under its said lease.

It is further ordered, adjudged and decreed that the plaintiffs Kuroki Twist and Willie C. Twist have and recover of and from the defendant four fifteenths (4/15) of the net proceeds of the oil and gas produced from said land & which is is agreed to in open court since September 29, 1919, to April 1, 1923, to-wit: the sum of (6,667.78) Sixty Six Hundred & Sixty Seven & 78 Dollars, the amount produced since April 1st, 1923, reserved for further consideration.

To all of which the defendant excepts, which exceptions are allowed, and in open court gives notice of appeal.

Done at Muskogee, Oklahoma, this 27th day of April, 1923.

R. L. Williams, Judge.

O K as to form. Linebaugh & Pinson, for Plffs.

[fol. 35] In United States District Court

Statement of Evidence—Filed August 13, 1923

Be it remembered that on this the 28th day of November, 1922, the above entitled cause came on for trial at Tulsa, Oklahoma, before Honorable R. L. Williams, United States District Judge, and the following proceedings were had:

Appearances: Linebaugh & Pinson and J. S. Watson, Esq., for Plaintiffs: A. A. Davidson, Esq., for Defendant.

Stipulation re Facts

Mr. Davidson: It is agreed that the Prairie Oil & Gas Company is a corporation organized under the laws of the State of Kansas, is a citizen of that state, and that the defendants are citizens of Oklahoma and the Eastern Judicial District thereof; that Leoria L. Twist Welty is the widow of William G. Twist; that Edward C. Twist, Kuroki Twist and Willie V. Twist, minors, and Albert T. Twist and Jessie L. Payne, nee Twist, both adults, are the children of Leoria L. Twist and William G. Twist, and that the said Leoria L. Twist Welty, Edward C. Twist, Kuroki Twist, Willie V. Twist, Albert T. Twist and Jessie L. Payne, nee Twist, are the only heirs of William G. Twist, deceased; that each of the plaintiffs are duly enrolled citizens of the Cherokee Nation of one-quarter Indian blood, except the two younger Kuroki Twist and Willie V. Twist who are not enrolled Cherokees having been born too late; that William G. Twist, deceased, was an enrolled Cherokee Indian and as such received as his allotment the lands set up in the petition in this case, and that he died intestate seized of said land on or about January 2, 1907; that on September 30, 1904,

William G. Twist was appointed guardian of Albert T. Twist, Edward C. Twist and Jessie L. Twist by the United States Court for Indian Territory, Northern District, and that in April, 1907, the cause was transferred to the Western District of the United States Court at Tulsa, Oklahoma, and that in June, 1907, Leoria L. Twist Welty was appointed guardian as successor of William G. Twist, deceased; that on September 30, 1904, William G. Twist executed to the Los Angeles Cherokee Oil Company an oil and gas mining lease, a true copy of which is submitted at this time, and that said lease was approved by the Secretary of the Interior and was for a period of fifteen years from its date and provided for a royalty of 10 % of the oil.

COLLOQUY BETWEEN COURT AND COUNSEL.

The Court: Now, just tell me what is involved in this case, I like to see what the statement of facts cover.

[fol. 36] Mr. Davidson: Here is what is involved in this case, the law point is this: That these original leases expired at a certain time and they were later extended by proceedings in the County Court of Tulsa County, Oklahoma, in 1916. The Prairie Oil & Gas Company took an assignment of these extended leases. Now, it is claimed those extensions were void because the County Court had no authority to make them.

The Court: Why?

Mr. Linebaugh: For two reasons, one is because there was a failure to comply with the state law as embodied in the statute and the rules of the Supreme Court with particular reference to Rule 9; and, 2nd, because it was undertaken to be made by the probate court.

The Court: Undertaken to do what?

Mr. Linebaugh: Be made by the probate court. That is there were three separate minors their separate individual allotments and the allotments of a deceased person involved, the minors acting through their guardian and the deceased person by his administrator, the same person acting as guardian and administrator and one petition was filed, one sale had and one price submitted, a lump sum submitted for the four separate properties without separate appraisements and without separate sales of the four separate properties.

The Court: Hasn't the Supreme Court held that the laws relative to the sale of real estate applied to these leases?

Mr. Linebaugh: They have not held that but the Jackson Carroll case holds, as we understand, that where a sale of separate properties of minors is in a bunch for a lump sum it is void.

The Court: That was sale of real estate. The way I take it the Duff Keaton case that was decided way back in 1911, and the legislature never passed any additional statute and I take it that they acquiesced in that construction of the law and that people have expended their money and invested their money on that construction that they have rights that the courts ought not to disturb.

Mr. Linebaugh: Your honor, one other fact that at the time this sale was made the properties sold were producing properties, there had already been wells drilled——

The Court: No question of fraud here?

Mr. Pinson: Yes, sir.

Mr. Linebaugh: It was a producing property.

[fol. 37] The Court: Are you going to offer evidence here to show that there wasn't an adequate consideration?

Mr. Linebaugh: Yes, sir; we will show that the sale was for a grossly inadequate consideration.

Mr. Davidson: That question is precluded by the judgment of the County Court.

The Court: They might prove fraud. If they show a grossly inadequate consideration that might be fraud.

Mr. Davidson: This now is a suit in equity. The question of the sufficiency of the consideration was passed on.

The Court: Well, we will see about that. I don't look with favor on an attack of these judgments where there was a proper consideration, but go ahead.

Mr. Davidson: That after the death of William G. Twist proceedings were had in the County Court of Tulsa County, Oklahoma, the said proceedings being evidenced by the following: petition of the guardian filed June 10, 1916, order of the County Court setting the petition for hearing, notice of hearing and proof of posting——

The Court: Now, which are the minors?

Mr. Davidson: Edward, Kuroki and Willie; Albert and Jessie are adults.

The Court: Which suit involves the minors?

Mr. Davidson: No. 2929.

The Court: Now, what is the action for the adults?

Mr. Davidson: They are seeking the same thing exactly.

The Court: Did they join in the lease?

Mr. Pinson: They were minors at the time of the extension.

The Court: Jessie and Albert?

Mr. Pinson: Yes, sir.

The Court: Very well.

Mr. Davidson: The order of the court of June 16, 1916, and the stipulation and agreement between the guardian and Los Angeles Cherokee Oil Company, all of which was set forth in the various petitions in this case as exhibits. And that further probate proceedings were had in the County Court relative to Kuroki Twist and Willie V. Twist, namely petition of their guardian of March 14, 1917, and the order of court thereon, report of guardian and the order of the court on the guardian's report, and also the same [fol. 38] stipulation between the guardian and Los Angeles Cherokee Oil Company, all of which is set out as exhibits in these petitions.

If it becomes material on the trial of this case we will admit that the lands described were producing oil to the amounts as shown by the guardian's petition filed in the County Court for authority to execute the extensions.

It is further agreed that on March 5, 1917, the Los Angeles Cherokee Oil Company assigned these leases to the Prairie Oil & Gas Company. We have photographic copies of the assignment which we will file as evidence in the case. We will admit that the Prairie Oil & Gas Company has been in possession and taking seven-eighths of the oil from the leases since January 15, 1917. Admit that the original cost of the William G. Twist lease, that is the amount paid for that lease by the Prairie Oil & Gas Company, was $112,561.62, and that since January 15, 1917, the Prairie Oil & Gas Company has expended in developing and operating the lease $46,970.98, which includes an item of overhead and supervision of $14,502.86, and that oil to the value of $188,630.36 has been taken from the land since January 15, 1917, up to September 30, 1922.

It is further agreed that the guardian of these five minors executed the usual division order providing for the distri-

bution of the proceeds of the oil taken from the land, originals of which are submitted with leave to withdraw the same and file photographic copies, and that since Albert T. Twist and Jessie L. Twist, have become of age—that Albert T. Twist became of age September 4, 1918, and that Jessie L. Payne, nee Twist, became of age December 8, 1917, and that since becoming of age they have executed similar division orders and each of them has received from the Prairie Oil & Gas Company their respective shares of the proceeds of the oil according to the division orders so filed by them; the shares of each of the parties in the William G. Twist lease being: Leoria L. Twist, as widow, one-third of the eighth royalty or 1/24, and each of the five children 1/5 of the 2/3 of the 8th or 1/60 each, and that payment of these royalties was made by check of the Prairie Oil & Gas Company, the form of the check being as shown by photographic copies thereof which will be filed as evidence in this case. That Albert T. Twist has received as his 1/60 the sum of $2,338.04 and that Jessie L. Payne has received as her 1/60 $2,336.65.

[fol. 39] The Court: Did these adults receive their royalty after they became of age? Why wouldn't that be a ratification?

Mr. Davidson: We plead that.

The Court: Why is that not recognizing the validity of the contract by receiving the royalty?

Mr. Pinson: Because it is merely a part of what they should have received anyhow. This is a contract which upon its face——

The Court: A contract made by a minor during his minority he can elect to continue after he becomes of age.

Mr. Pinson: I don't think so, your honor. We want to be heard upon that proposition.

The Court: Very well.

Mr. Davidson: We also agree, if it becomes material to offer such evidence, that the market value of crude oil in the Mid-Continent Field on June 16, 1916, was $1.35 a barrel. It is further agreed, if it becomes material to offer the evidence, that Dana H. Kelsey, if present and we concede he is unavoidably absent, as a witness would testify that he acted for the Prairie Oil & Gas Company in negotiating the purchase—in connection with Fred S. Cook—acted for the

Prairie Oil & Gas Company in conducting the negotiations for the purchase from the Los Angeles-Cherokee Oil Company of these Twist leases, together with a large number of other leases owned by the Los Angeles-Cherokee Oil Company, and that there was paid for said leases by the Prairie Oil & Gas Company the following sums: for the William G. Twist lease $112,561.61; for the Albert T. Twist lease $45,556.87; for the Jessie L. Twist lease $43,870.39; and for the Edward C. Twist lease $49,377.38; and that at the time of completing such purchase and the payment of said moneys and the taking of the assignments he had no notice or knowledge of the transactions alleged by the petitions to have occurred or taken place between the officers or agents of the Los Angeles-Cherokee Oil Company and Leoria L. Twist, guardian, in connection with the agreement to extend the leases, but that he purchased these leases on behalf of the Prairie Oil & Gas Company subject to an examination of the abstracts furnished the Prairie Oil & Gas Company, and that in such transaction H. B. Anderson and a man by the name of Pitt represented the Los Angeles-Cherokee Oil Company, and that neither of said persons referred to or informed him concerning any matters, conversations or transactions between the Los Angeles-Chero- [fol. 40] kee Oil Company and its representatives and Leoria L. Twist Welty.

It is also agreed that Albert T. Twist had an allotment of his own as described in the petition and that an oil and gas lease was made by his then guardian on March 22, 1905, which was for a term of 13 years, 5 months and 12 days, a copy of this lease, as well as the other leases, will be filed as evidence in this case; that this lease is embraced in the proceedings of the County Court of Tulsa County and was one of the leases assigned to the Prairie Oil & Gas Company. That there has been expended by the Prairie Oil & Gas Company in the development and operation of this lease since it took charge $43,344.54, which includes an overhead charge or cost of supervision of $8,072.86; and that the value of oil taken from that land up to September 30, 1922, was $87,567.58.

That as to the Jessie L. Twist lands she had an allotment of her own and that was leased in the same way and at the same time as the allotment of Albert T. Twist, and that the Prairie Oil & Gas Company has expended for development

and operation on that lease $16,053.51, which includes an overhead charge of $5,447.64.

That Edward C. Twist had also an allotment of his own which was leased at the same time and to the same lessee; that the oil produced from the Jessie L. Twist land up to September 30, 1922, is $65,233.01; that the amount of money expended on the Edward C. Twist lease was $38,240.59, which includes an overhead charge of $7,965.27, and that the oil produced from that lease up to September 30, 1922, was $80,055.71.

Plaintiffs have asked us to agree and we do agree, if it is material to be considered, that at the time that the Prairie Oil & Gas Company paid the Los Angeles-Cherokee Oil Company for these leases, to-wit, $251,266.21, which was in February, 1917, the daily production from these four leases was 104.81 barrels, and that the daily production at the present time is 65.56 barrels.

The Court: You have made no development since 1917?

Mr. Davidson: Oh, yes; we have drilled two wells and invested these amounts which we have stipulated.

The Court: Have you drilled any new wells since any of these minors became of age?

Mr. Davidson: No, I don't think so. Let me see. There was a well drilled on the Albert T. Twist allotment which [fol. 41] was completed October 5, 1919, which was after he became of age.

The Court: When did he become of age?

Mr. Pinson: September 18th.

The Court: September, 1918. Now, when was the first payment of royalty made to him after he was of age?

Mr. Davidson: His division order which he signed himself as an adult is dated November 1, 1918, and the first payment was made under that division order.

The Court: How near does he live to this lease?

Mr. Pinson: I frankly don't know.

Mr. Davidson: The lease is in this county and he lives here.

Mr. Pinson: He will be on the stand.

The Court: Very well.

Mr. Linebaugh: Would your honor care for a brief statement of the plaintiffs' theory elaborating on these exhibits?

The Court: Very well.

Mr. Linebaugh: I desire particularly to call the court's attention to the several exhibits attached to plaintiff's petition, which, under the agreement just dictated into the record, are incorporated and made a part of the record in the case as well as being attached to the petitions. The petition filed in the County Court of Tulsa County for the sale of this so-called extension lease is filed in one petition, filed——

The Court: Filed in one petition but does it recite all the heirs, set their names out? As far as I am concerned I am not going to extend the doctrine. The court held a long time ago that an oil and gas lease was not the character of an instrument that it required it to be complied with the sale of real estate. The legislature of the state never changed that; they permitted that to stand there year after year. Now, people that would invest on those decisions, there were two of them—I tried a case down at Ardmore the other day involving half a million dollars where they tried to strike down an oil and gas lease just like this; I decided in favor of the defendant. Now, unless there is fraud I am not going to disturb this thing. The burden is on you.

Mr. Linebaugh: The record now shows that this property was sold, this extension was sold on June 16, 1916, it was then producing 120 barrels a day.

[fol. 42] The Court: How much did you get for it?

Mr. Linebaugh: $18,000.00. In February following in seven months the production having decreased to 104 barrels, it sold for $251,000.00, when there was a decrease in production, so we think that is so grossly inadequate——

The Court: If they were fair on their face wouldn't they be innocent purchasers? They didn't have knowledge of fraud? Who was the guardian?

Mr. Linebaugh: Mrs. Welty, the mother of the children.

The Court: You mean then she ought to have a guardian.

Mr. Linebaugh: The evidence probably will develop the unfortunate situation but our view is that when the Prairie went to buy this property in February, 1917, and paid therefor $251,000.00 when the production had decreased the record showed to them that it had been sold for $18,000.00 that is such an inadequate consideration as to put them on inquiry, and if that inquiry had been pursued by them the

fraud practiced upon the guardian would have been disclosed. And we call the court's attention to the petition to show that the irregularities which they would have necessarily have known appear on the face.

The Court: Now, what are the irregularities?

Mr. Linebaugh: The first one which I desire to call the court's attention to is the fact that an extension lease was sold on the allotment of the deceased father whilst two of the heirs were not included as petitioners, and a petition for the sale of the interests of those two heirs was not filed until after the Prairie Oil & Gas Company had taken that and then without any additional consideration or without any notice of any character whatsoever being given to any person. Furthermore that in the petition no effort was made, except so far as a co-called notice was posted, to comply with Rule 9 of the Supreme Court Rules. Furthermore, that no order of sale was ever entered or made by the County Court of Tulsa County responsive to this petition. All of those matters appearing upon the face of the petition and several orders made by the County Court. The pleadings further show that the petition recites upon its fact a prior agreement entered into with the Los Angeles Cherokee Oil Company to sell to it for a fixed consideration therein set forth and agreed upon. No order of sale was entered by the County Court, none made, and the [fol. 43] papers filed with the County Court show that no competitive bidding was had, no public sale was made but merely a sale made responsive to a prior agreement made between the Los Angeles Cherokee Oil Company and the guardian. All of those matters appearing upon the face of the petition and the orders entered by the County Court. Now, we feel that those irregularities taken in connection with the grossly inadequate consideration should have put the Prairie upon notice.

Mr. Davidson: If the court please, I think it would be of interest to have these probate proceedings read. I would like to read those.

Mr. Linebaugh: I will read them, we are offering them.

The Court: If you will pass them up here I will read them.

LEORIA L. WELDY produced, sworn and examined as a witness for and on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Linebaugh:

Q. You may state your name.
A. My name is Leoria L. Weldy, nee Twist.
Q. You live here in Tulsa?
A. Yes, sir.
Q. You were formerly the wife of Mr. William G. Twist?
A. I was.
Q. He was a citizen of the Cherokee Nation or tribe of Indians, was he?
A. Yes, sir.
Q. Do you know Albert T., Edward C., Jessie L., Kuroki and Willie V. Twist?
A. Yes, sir.
Q. Are they your children?
A. Yes, sir; they are my children.
Q. The allotments of your husband and the first three children I just named were leased for oil and gas purposes to the Los Angeles Cherokee Oil Company, were they?
A. Yes, sir.
Q. Do you know whether those leases were what is commonly known as commercial leases or departmental leases?
A. They were departmental leases.
Q. Do you recall the time of their execution?

Mr. Davidson: That is all stipulated.

Q. At the time of their execution your husband was living, that is, Mr. Twist?
A. Yes, sir.
Q. After his death you became the guardian of these several children?
A. Yes, sir.
Q. And also administrator of your husband's estate did you?
A. Yes, sir.
[fol. 44] Q. The Los Angeles Cherokee Oil Company operated this property and produced oil from it?
A. Yes, sir.
Q. And each of the tracts did they?
A. Yes, sir.

Q. After the period of operation was any inquiry made of you with regard to changing the form of the leases?

A. There was.

Q. When and by whom?

A. Well, at different times, by Mr. Pitt, also Mr. Anderson at one time.

Q. Mr. Pitt and Mr. Anderson to whom you refer were gentlemen associated with the Los Angeles-Cherokee Oil Company?

A. They were; they belonged to the company, stockholders.

Q. Do you remember how long before certain court proceedings were instituted they first begun to talk with you about the extension of these leases or the changed form of the leases?

Mr. Davidson: We object to that as incompetent, irrelevant and immaterial to any issue.

The Court: I will let it go in the record.

Mr. Davidson: Exception.

A. Well, it was in 1909, the first time they ever named it to me.

The Court: Who was that named it to you?

A. Mr. Pitt and Mr. Anderson were both together.

The Court: Who is Mr. Pitt?

A. He was a stockholder and foreman or something for the Prairie people.

Q. He had charge?

A. Yes, sir.

Mr. Davidson: It surely couldn't be material back as far as 1909.

The Court: No.

Q. Just prior to the institution of the court proceedings did Mr. Pitt or Mr. Anderson on behalf of the Los Angeles-Cherokee Oil Company talk to you in regard to the changing of the form of the leases?

A. Yes, sir; Mr. Pitt did several different times for the last year or two before we did change.

The Court: Mr. Linebaugh, she signed a petition here which sets out these facts. I don't see the relevancy of any conversation she had with them.

Mr. Linebaugh: Well, to show why she filed the petition.

[fol. 45] Q. You filed a petition with the County Court of Tulsa County asking that the form of these leases be changed or the terms be changed?

A. Yes, sir.

Q. Who prepared that petition?

A. Well, I think Mr. Rice & Lyons. I am not sure. The Los Angeles Cherokee had them prepared themselves.

Q. Where were you when you signed the petition if you remember?

A. I think I was at home.

Q. Who brought the petition to your home?

A. Mr. Pitt.

Q. Why did you sign the petition?

Mr. Davidson: We object to that.

The Court: I will see what her answer is.

A. Well, there was various reasons.

Q. Tell the court what those were.

A. Well, kind of fear, to be positive.

The Court: Fear?

Q. Fear of what?

A. Well, I had been getting letters from different oil companies around me——

The Court: Oh, well; I will exclude that.

Mr. Linebaugh: I think probably this will be of some importance, your honor.

The Court: Why?

Mr. Linebaugh: The fact that she had received letters saying that they were going to put vacuums on wells adjacent to her property. Mr. Pitt says if vacuums are put on we will have to put vacuums on and that will draw all the oil out very quickly and you had better take this $18,000.00. But we will show immediately after she filed this petition those letters stopped coming and no vacuum was put on.

The Court: I will let it go in and hold against you on it.

Mr. Linebaugh: That is merely one of the circumstances.

The Court: If that is all you have got.

Mr. Linebaugh: No, that isn't all, your honor.

The Court: That is a reflection on her as guardian. Who was your attorney, Madam?

A. I didn't have any to represent me that time, they done all the work themselves. I was in very poor health. I had had one but I didn't have any right at that time because they said it wasn't necessary, they would fix the papers all themselves.

[fol. 46] Mr. Davidson: Did Mr. L. J. Martin represent you?

A. No, not at that time.

Mr. Linebaugh: We will offer to prove——

The Court: Don't offer to prove but put it in there.

Q. You may go ahead with the statements, if any, that were made——

The Court: Statements made by Mr. Pitt. The letters are the best evidence of what they contained.

Q. What statements Mrs. Weldy, if any, did Mr. Pitt or Mr. Anderson make to you at the time they were discussing with you the question of changing the form of the leases with regard to the installation of vacuums on the wells?

Mr. Davidson: We object as to what Mr. Pitt says. Her evidence is Mr. Pitt was foreman.

The Court: She testifies Mr. Pitt came to her to get her to sign the extension. If he made any negotiations that would be evidence that he was acting for his company.

Mr. Linebaugh: You may answer.

A. Well, he said that if the other companies put those vacuums in they would soon kill the life of the wells, and also when he was wanting me——

The Court: Now, let me ask you a question. If you didn't extend the leases you would get the wells back, wouldn't you?

A. Certainly.

The Court: Then you could have had vacuums put on or made arrangements?

A. Yes, but if they had put them on they would have killed those wells before we got them back.

The Court: They would have forfeited the leases if they hadn't.

Mr. Linebaugh: Those are facts, we know, but she didn't.

The Court: Yes, but it was her business to go to her

counsel. If you are going to have such clap-trap as that, then no contract is sacred.

Q. What, if anything, did Mr. Pitt tell you would be the effect of placing vacuums upon the wells?

Mr. Davidson: We object to all this.

The Court: I am going to let them put it in and hold against them.

A. They said it would suck all the oil out of the ground. He said if we don't the other companies will get the oil.

[fol. 47] The Court: That is no false statement. That is a fact. She had her rights. If they failed to produce the oil she could go ahead and have it cancelled.

Q. Mrs. Weldy, at that time were you having any difficulty with reference to your bond as guardian?

A. Well, I was under surety bond which was costing me quite a little bit.

Q. What statements, if any, with regard to your bond did Mr. Pitt or Mr. Anderson make to you during the period of these negotiations for the change of the terms?

Mr. Davidson: We object to that.

The Court: I sustain the objection. The Prairie Oil & Gas Company couldn't have notice of such as that.

Mr. Pinson: The burden would be on the defendant to prove good faith.

The Court: No, not in that.

Mr. Linebaugh: We will offer to prove by this witness that during this negotiation Mr. Pitt and Mr. Anderson discussed with her the question of her bond and inability to continue it and avowed their willingness to make her bond so that she could retain the guardianship for such amounts as would be necessary, providing she would consent to, accede to their request to sign the petition for the extension of the leases, and subsequently they did in fact make her bond——

The Court: Suppose they did.

Mr. Linebaugh: Becoming surety and that that was—well, I am making an offer—and such bond with Anderson and Pitt as sureties was filed in the County Court of Tulsa County and was of record at the time of the purchase by the Prairie Oil & Gas Company.

The Court: Suppose they did go on her bond, what effect would that have? How could that constitute fraud?

Mr. Linebaugh: It would constitute fraud taken with the other circumstances it seems to us.

The Court: I exclude that evidence. She says she had difficulty with her bond and they said they would help her make it. What is wrong about that?

Mr. Linebaugh: They are using that as an inducement, saying we will agree to make your bond providing you will do this for us.

The Court: No, I don't think that is competent.

Mr. Linebaugh: We except.

Q. Mrs. Weldy——

[fol. 48] The Court: I will see what she has to say. You say Mr. Pitt come to you about signing the petition?

A. Yes, sir.

The Court: What did he say to you?

A. Well, of course, he asked me if I wouldn't make a commercial lease, is what he called it; he didn't say anything about a transfer. I told him "Mr. Pitt, I don't care to because while I am under the departmental lease we have the protection of the department." He says "You have the protection of the whole state under a commercial." I says that wouldn't be much when I had it, no, I don't feel like making that. He made the remark "You have always done the best for your children in every way." He says "Do you think by refusing this offer that you are still doing right by your children?" And he says, "Do you think that the court will think that you are doing right?" Of course, I studied about it and I told him I didn't know what the court would think. He says "You know there have been a good many guardian seeker's eyes on your minors all the time." And of course, when he made that remark it throwed a kind of fear over me that they might try to take the guardianship away from me. That is one of the things that caused me——

The Court: Never mind. What else was said?

A. I don't remember every detail. I told him I didn't like to accept it but of course I did. He went up and got the papers.

The Court: He told you he would give $18,000.00 for a new lease, is that what he said?

A. For a commercial lease.

The Court: Well, that would be a new lease. Then you signed this application a copy of which has been offered here?

A. Yes, sir.

The Court: Go ahead.

Q. What statements, if any, did he make to you with reference to the value of the property?

The Court: Don't make suggestions.

A. Well, I told him I didn't think it was enough. He says "Sure it is enough, it is really more than the leases are worth." And then is when he come over it again. He says "Do you suppose that the court will think that you are still doing the best for your children if you refuse that?" And that is about all of it that I can remember.

Q. Did you subsequently after filing the petition go to the County Court room in Tulsa?

A. Yes, sir.

[fol. 49] Q. Who, if any person, accompanied you?

A. Mr. Pitt come and taken me in his car.

Q. Was anyone with Mr. Pitt or did just the two of you go?

A. I won't be positive, but there was no one went up to the court house with us; I think the other parties were already there.

Q. What other parties?

A. There was one attorney there and I don't know whether it was Rice or Lyons because I was not acquainted with them at the time.

Q. When you got to the court room what happened?

A. Well, Mr. Pitt taken the papers up to the judge.

The Court: You mean he had the papers with him?

A. He had papers with him.

The Court: Why, the petition you filed was in court, wasn't it?

A. He went up and talked to the judge a few minutes.

Mr. Linebaugh: This was on the day of the confirmation, your honor.

The Court: Yes, but the petition she signed would be a part of the court files.

Q. Were you ever in the County Court room concerning this matter except this one time?

A. No, sir.

The Court: You were there when they had the hearing and the judge determined to permit you to make a commercial lease; were you present then?

A. I think the papers were signed at my own house and taken up by them.

The Court: They had been signed but on the day of the hearing you appeared in court and the court granted you authority to make a new lease?

A. It was all done at the same time.

The Court: That was the time you appeared before the court, wasn't it?

A. Yes, sir.

The Court: Judge Ramsey?

A. Yes, sir; Judge Ramsey.

The Court: And Judge Ramsey talked to you about that?

A. Very little. He asked me if I thought I was doing for the best interest of my wards. I told him I did owing to the conditions surrounding. He said "I am satisfied that you are, you always have done such." And he says "I in my own mind think it is best." And that is about all that [fol. 50] occurred in the court room that day.

Q. Had you signed the papers at that time?

The Court: When did you sign the new lease, there in the court that day?

A. I won't be positive whether I signed it there. I know we went on up to their attorney's office and there was some papers signed there.

Q. Was there any evidence taken in the court room, that is were any witnesses sworn and their testimony taken?

A. No, sir.

Q. Were you sworn and your testimony taken or just these questions asked you at the judge's bench; was there any auction sale conducted in the court room?

A. No, sir; not while I was there.

The Court: Well, do you know whether there was any other evidence taken before the judge?

A. There was none taken while I was there. There were no questions asked any one else while I was there.

Q. Did the judge sign the order while you were standing at his bench there?

A. Well, the judge signed papers right there.

Q. While you were standing at the desk?

A. Yes, sir.

Q. And then you think you went up to Rice & Lyon's office?

A. Yes, sir.

Q. And possibly signed some papers up there?

A. I know I signed something, some papers.

Q. Now, was there any auction sale while you were standing there at the judge's desk?

A. No, sir.

Q. Or any bidding while you were in the court room?

A. No, sir; there was nothing said to that effect.

Q. Nobody asked if anybody wanted to bid?

A. No, sir.

Q. How long were you in the court room altogether?

A. Well, we wasn't there very long. Of course, there were one or two parties ahead of us to see the judge and we had to wait until they were through. I don't think we were in there over thirty minutes at the outside.

Q. After the judge signed the paper at his desk how long did you remain in the court room?

A. Just a few minutes.

Q. Who went out with you?

A. Mr. Pitt and the two attorneys.

Q. Was that the only time you were up in the County Court room concerning the sale of this commercial lease as you term it or extension lease?

A. It was.

Q. Now, had you had any conversation with your son Albert T., with regard to the guardianship?

A. Yes, sir; we talked it over several times.

[fol. 51] Q. Before you signed the petition?

A. Yes, sir.

Q. What statements, if any, did he make to you——

The Court: Never mind about that. Do you object to that?

Mr. Davidson: Yes, sir; we object to all this.

The Court: I sustain the objection to that.

Mr. Linebaugh: Will the court permit me to finish my question so as to make my offer?

The Court: No, that is not the rule in the Federal Court.

Mr. Linebaugh: I will ask it this way if I may, your honor:

Q. Did your son Albert T., tell you of certain statements which Mr. Pitt had made to him concerning your guardianship?

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: We except.

Q. Mrs. Weldy, the $18,000.00 offer which Mr. Pitt made what was that for?

A. Well, it was for the making of a commercial lease, he said.

Q. On what properties?

A. On the W. G., Albert T., Jessie L. and Edward C.

Q. That was four separate allotments were they?

A. Yes, sir.

The Court: He said he would pay as much as $18,000 for a commercial lease on these allotments, that is what he meant by an offer, isn't it?

A. Yes, sir.

Q. Now, who if you know made—if there was any division of that $18,000.00 made as applying to each of the separate allotments who made it?

Mr. Davidson: If the court please we object to that.

The Court: Yes, I sustain the objection. The record shows what was done.

Q. Who, if any person—well, I will ask you this: prior to the petition being brought to you for your signature by Mr. Pitt was the method of division and amount of the division of the $18,000.00 discussed and agreed upon between you and Mr. Pitt?

Mr. Davidson: We object to that, wholly incompetent

The Court: I sustain the objection.

[fol. 52] Q. Was any separate price ever suggested by Mr. Pitt or agreed upon between the two of you as to the separate allotments?

A. No, sir.

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Mr. Davidson: We object to that.
The Court: I sustain the objection.
Mr. Linebaugh: Exception. That is all.

Cross-examination by Mr. Davidson:

Q. You say you had no lawyer?
A. I didn't have any one representing me at that time.
Q. Did you have a man named Robertie?
A. I didn't at that time.
Q. You didn't go to see him?
A. No, sir.
Q. He was your attorney?
A. Yes, sir.
Q. Didn't you employ L. J. Martin?
A. Not in this.
Q. Didn't L. J. Martin go up to court with you the time Judge Ramsey had this hearing?
A. If he did I do not remember it.
Q. You never employed Mr. Martin?
A. Mr. Martin did do work for me.
Q. When, after that or before that?
A. Well, before and some after that. He made the final reports for the two children when they became of age.
Q. Do you say now you didn't go with Robertie or Martin?
A. No, sir.
Q. You didn't go to any attorney at all?
A. Mr. Pitt came down and we had the talk and he said it won't be necessary for you to pay an attorney fee.

Mr. Linebaugh: Won't you let her complete her answer?
The Court: I exclude that because it is not responsive to the question.

Q. You signed this petition and swore to it didn't you?
A. Yes, sir.
Q. Over six years ago?
A. Well, it was when the lease was being made.
Q. And there has been nothing to prevent your coming to court with this matter within the last six years?
A. The children, when they became of age, took it up.
Q. But you still represent three minor children?
A. I do.

Q. You have an interest in William G. Twist's land as his widow?

A. I have a third interest.

Q. And you are getting your share of the one-eighth royalty from that lease?

A. Yes, sir.

Q. And have been all the time?

A. Yes, sir.

[fol. 53] Q. And you have filed no suit for yourself?

A. No, I have filed no suit.

Mr. Davidson: I believe that is all.

Redirect examination by Mr. Linebaugh:

Q. Mrs. Weldy, why didn't you get an attorney in these proceedings?

A. Well, I don't know, only just I didn't and Mr. Pitt said he didn't think it would be necessary, they would take care of that.

The Court: He told you that he had an attorney?

A. He didn't come right out and say that; he just said they would take care of that.

The Court: Said they would have the papers fixed up?

A. Yes, sir.

Recross examination by Mr. Davidson:

There was an agreement there wasn't there that this royalty was to be increased from 10% to 12½%?

A. There was.

Q. And that was part of the consideration?

A. Yes, sir.

Q. And ever since that time an eighth royalty has been paid?

A. Yes, sir.

The Court: How long before the fifteen year lease had expired when this agreement was made?

Mr. Linebaugh: About two years, your honor.

(Witness excused.)

ALBERT T. TWIST, produced, sworn, and examined as a witness for and on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Linebaugh:

Q. Your name is Albert T. Twist?

A. Yes, sir.

Q. Where do you live?

A. Tulsa, Oklahoma.

Q. How old are you?

A. Twenty-five.

Q. You are one of the plaintiffs in these suits?

A. Yes, sir.

Q. Did you know Mr. Pitt of the Los Angeles Cherokee Oil Company?

A. I do.

Q. Do you recall the incident of the filing of a petition by your mother to change the form of the leases covering your allotment and your brother's allotment and your father's allotment?

A. Yes, sir.

[fol. 54] Q. During the period of those negotiations and shortly before signing the petition were you in Mr. Pitt's office?

A. I was.

Q. Why did you go to Mr. Pitt's office?

A. I met him on the street one day. He asked me to go up to the office with him. I did.

Q. How long before the petition was filed?

A. I can't recall exact number of days, only a short time, possibly a month.

Q. What statements, if any, did Mr. Pitt there make to you regarding the petition and your mother as guardian?

Mr. Davidson: We object to that as immaterial.

The Court: I sustain the objection.

Mr. Linebaugh: Plaintiffs except.

The Court: It is barely possible this might be admissible on one theory. This man is twenty-five years old. This suit was brought last August and he is a party to the suit as I understand.

Mr. Davidson: His own suit.

The Court: Now, on the question of election as to what he knew and things like that might be competent on that.

Mr. Davidson: Yes, but as far as he himself is concerned he has elected.

The Court: All the evidence is competent for is to show the election and background. As to his case I would permit that but confine it to his action. I don't know what he is going to say.

Mr. Davidson: The only thing he could say would be in support of the allegations in the petition that these men are alleged to have said to him "if your mother don't do what we think is for the best interests we will complain to the court." It wouldn't be fraud.

The Court: That is not fraud.

Q. What representations, if any, did Mr. Pitts make concerning your mother's guardianship which you communicated to your mother?

Mr. Davidson: We object to that as wholly incompetent and immaterial under the issues in this case.

The Court: I sustain the objection.

Mr. Linebaugh: Plaintiffs except and wish to make their offer.

The Court: No I don't understand that to be the rule in the Federal Court that you have to fill up the record with what you propose to prove.

[fol. 55] Q. Mr. Twist, after you became of age was a well drilled upon your allotment?

Mr. Davidson: We object to that as incompetent, irrelevant and immaterial, not within any issue. I don't know the purpose unless it is this, that one of the things that they agreed to in that extension was that they should drill a well within six months. They don't make a charge in that respect, therefore it is not competent here.

Mr. Linebaugh: The statement which we agreed to shows the drilling of a well on this man's allotment after he became of age.

Mr. Davidson: I have no objection to that. That is already in evidence.

Mr. Linebaugh: We propose to show that this man

knew nothing about the drilling of that and did not consent to it.

The Court: If after it was completed he accepted the royalty I think that is an election.

Mr. Davidson: Completed two years ago and he is still taking the royalty.

Mr. Linebaugh: We do not think that will constitute an election.

The Court: I do. I am going to hold that unless you can show me some law to the contrary and I do not think you can.

Mr. Linebaugh: May I pursue this inquiry for that purpose?

The Court: You can put that in the record.

Q. Did you know anything about the drilling of that well or have anything to do with having it drilled?

A. No, sir.

Q. Until after the well was completed?

A. That is until it was practically completed.

Q. You signed a division order after you reached your majority, did you?

A. Some time near that time, yes.

Q. I hand you a photographic copy of a division order appearing to have been signed by you on November 1, 1918. You signed that, did you?

A. Yes, sir.

Q. At the time you signed this division order had you made any investigation of the method employed in the court by the Los Angeles Cherokee Oil Company to get an extension of the lease on your land?

A. No, sir.

Q. At that time did you believe the proceedings had were regular and that the title of the Prairie Oil & Gas Company was valid?

[fol. 56] Mr. Davidson: We object to that.

The Court: At that time you were twenty one years of age?

A. Yes, sir.

The Court: You intended to live up to that contract made by your mother?

A. Yes, at that particular time.

The Court: You never had any other intention until some attorney advised your mother to set that aside?

A. No, sir; no attorney advised me. I figured that out of my own volition.

The Court: When did you find that out?

A. Just a little over a year ago.

The Court: How?

A. Through records of the Supreme Court handed down in Barnes vs. a certain oil company and Carlisle.

The Court: Up to that time you when you understood the Supreme Court handed down that opinion you intended for this contract to be carried out?

A. Yes, sir; if it was a binding contract. I thought if it was carried out in a business like manner.

The Court: With that expectation you accepted these royalties?

A. Yes, sir.

Q. Mr. Twist between the 16th day of June, 1916, and the 1st of March, 1917, were any improvements made or additional development of this property made?

A. No, sir.

Q. Was the property in February, 1917, so far as the physical property is concerned in practically the same condition that it was in June, 1916?

A. It was.

Cross-examination by Mr. Davidson:

Q. You understood didn't you, that these moneys you were getting from the Prairie Oil & Gas Company was to pay your one-eighth royalty?

A. Yes, sir; one-eighth of a working interest.

Q. And you have taken that royalty up to last May?

A. Yes, sir.

Q. Since then you have assigned your royalty haven't you?

A. I assigned it to the Title Guaranty & Trust Company as collateral for a loan.

Q. They have been collecting it since then?

[fol. 57] A. Yes, sir.

Q. You say you knew of the drilling of this well about the time it was completed?

A. Yes, sir.

Q. And that was in September, 1919?

A. Yes, sir.

Mr. Davidson: We at this time offer and ask to have considered the division orders identified by the witness.

The Court: Very well, they may be considered read.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL.

Mr. Linebaugh: For the purpose of the record, your honor, we desire to offer that portion of the report of the Commissioner of Indian Affairs of the United States to the Secretary of the Interior for the fiscal year ended June 30, 1914, appearing at pages 50, 51, 52, 53, 54 and 55, referring to the probate work of the Interior Department of the United States in Oklahoma, particularly that portion relating to the presentation or the preparation by and presentation to the Supreme Court of this state and its adoption of the rules of procedure which was adopted by the Supreme Court of this state on June 11, 1914.

Mr. Davidson: For what purpose do you offer that?

Mr. Linebaugh: For the purpose of showing that the rules as adopted by the Supreme Court were adopted for the adequate protection of minors of the State of Oklahoma of Indian blood and adopted in furtherance and to carry out a policy of the Department of the Interior and were adopted by the Department of the Interior and hence become not only the law of this state but a settled policy of the Interior Department and to that extent rules and regulations of the Secretary of the Interior.

Mr. Davidson: We object to the introduction of any part of this as evidence in the case.

The Court: I sustain the objection.

Mr. Linebaugh: Plaintiffs except. Now, may it be considered that that portion has been read into the record or may we substitute a copy?

The Court: That may be offered.

Mr. Linebaugh: May we withdraw the original and substitute a copy?

The Court: Yes, I will allow you to offer it. If you want

to put in the record the rules as adopted by the Supreme Court of the state you may put them in the record.

Mr. Davidson: All the rules?

[fol. 58] The Court: Put them all in there unless it would encumber the record. Of course, I take judicial knowledge of it anyway, but it will probably be convenient for all parties to have them in the record.

Mr. Linebaugh: Will it also be agreeable to substitute a copy of that?

Mr. Davidson: Yes.

(Whereupon a recess was taken for the noon hour and court having reconvened at two o'clock P. M., the following proceedings were had:)

STIPULATION

Mr. Linebaugh: It is agreed that the posted market price of crude oil from January 12th to August 2, 1917, was $1.70 a barrel.

Mr. Davidson: That is conceded subject to its materiality.

Mr. Linebaugh: And, subject to the same objection, that the price paid by the defendant company on the properties involved at the time of their purchase was a fair and reasonable market value in their then condition.

Mr. Davidson: We don't concede that at all. I don't know.

Mr. Linebaugh: Oh, I beg your pardon. Strike that out.

W. P. PHILLIPS, produced, sworn, and examined as a witness for and on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Linebaugh:

Q. Your name is W. P. Phillips?

A. Yes, sir.

Q. You live in Tulsa?

A. Yes, sir.

Q. Are you acquainted with the properties in this consolidated litigation commonly known as the Twist allotments?

A. Yes, sir.

Q. Situated in Sections 24 and 19, Township 20 North, Range 12 East?

A. Yes, sir.

Q. Have you property in that locality Mr. Phillips?

A. Not in that immediate locality. Some three or four miles beyond that.

Q. Have you producing oil property producing from the same sand as the production is coming from on the Twist property?

A. Yes, sir.

Q. How long have you been interested in such production?

[fol. 59] A. Well, I believe about since the first oil was discovered up there, twelve or fifteen years.

Q. For the last twelve or fifteen years?

A. Yes, somewhere along there.

Q. Were you acquainted during the year, 1916, with the market value of production from the Bartlesville Sand from which the production comes on the Twist lands?

A. I didn't understand.

Q. Are you acquainted with the market value of production *of production* coming from the Bartlesville Sand, the same sand from which the oil on the Twist properties was being produced?

A. At what time?

Q. 1916?

A. Only in a general way is all.

Q. In a general way, but you know what that market value was?

A. Yes, sir.

Q. What was it?

Mr. Davidson: If the court please, we object to that.

The Court: I don't think he shows himself qualified.

Mr. Davidson: We object for the further reason that the only purpose of this testimony would be to assail in this collateral proceeding the judgment of the County Court as to the sufficiency and adequacy of the consideration which the County Court passed upon?

The Court: Do they claim fraud?

Mr. Davidson: No fraud claimed to be practiced upon the County Court at all. This is a sale confirmed by the

court, made pursuant to the order of court and confirmed by the court, and the rule is that the adequacy of consideration can't be inquired into.

The Court: I sustain the objection.

Mr. Linebaugh: The plaintiffs except. Might I inquire——

The Court: I sustained it upon both grounds.

Mr. Linebaugh: May we further qualify the witness?

The Court: You may try to qualify him. I don't think it is competent.

Mr. Linebaugh: That is all Mr. Phillips.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL.

Mr. Linebaugh: That is our case, your honor. It is agreed that the charge for overhead as made by the defendant company is an arbitrary charge of 10%.

Mr. Davidson: What we say is, this was an overhead charge which is a charge for the salaries of the [fol. 60] superintendent, office force, clerical force, on all the properties. That is a customary charge made against each lease.

Mr. Linebaugh: An arbitrary charge of 10%.

Mr. Davidson: It is customary and the company has arrived at that as a fair and proper charge.

The Court: Now, there are five of them.

Mr. Davidson: Four leases.

The Court: Albert T. Twist, he was on the witness stand, twenty five years old, Edward C. Twist.

Mr. Davidson: He is still a minor.

The Court: Jessie L. Twist.

Mr. Davidson: Jessie L. Twist is 26 years old.

Mr. Linebaugh: No, she is about 22.

The Court: She was an adult when she was 18 years old, so she became of age——

Mr. Pinson: September 7, 1918.

The Court: And the other two heirs.

Mr. Davidson: Kuroki and Willie.

The Court: Their interest is as heirs of their father's estate, the estate of William G. Twist.

Mr. Davidson: That is right.

The Court: Very well.

Mr. Davidson: We think we are entitled to judgment in this case.

The Court: Have you any evidence to offer?

Mr. Davidson: We have no evidence.

The Court: All right, I will hear your argument on both sides.

(Whereupon counsel presented argument to the court.)

PLAINTIFFS' EXHIBIT #1

(Extract from Portion of Pages 50 to 55, Inclusive, Report of the Commissioner of Indian Affairs, 1914)

Probate Work in Oklahoma

The minor children of the Five Civilized Tribes are perhaps the richest average children in the United States, which condition results from the fact that in allotting the Oklahoma Indians the children were given the same number of acres of land as their parents and share equally in [fol. 61] tribal funds. Consequently when Congress, in the Act of May 27, 1908, conferred upon the County Courts probate jurisdiction there was involved a greater amount of probate work than existed anywhere else. This, together with the fact that Oklahoma was admitted into the Union in 1907, and that the county judges then elected did not all possess the highest standards necessarily brought about a demoralized, inefficient, and in some instances corrupt condition.

It is apparent that many guardians were appointed without regard to their fitness and insolvent bondsmen accepted. It was not uncommon for lands of minor Indian children to be sold on appraisements influenced by prospective purchasers and for inadequate prices. Excessive compensation was many times allowed guardians and unreasonably large fees paid to attorneys. Under these conditions the property of Indian children was frequently so ravished that when final reports were called for they were not forthcoming, and estates were often found to have been dissi-

pated and their bondsmen financially irresponsible. Altogether it developed a condition demanding speedy and radical reforms.

I found this startling situation soon after my induction into office in June, 1913, and immediately proceeded to effect an organization whereby there might be assurance that this indefensible procedure might no longer maintain. Thereupon I arranged for conferences to be held at Muskogee with the county judges, prosecuting attorneys, district judges, and others interested in betterments for the territory covered by the Creek, Cherokee, and Seminole Nations, at McAlester covering the Choctaw Nation and likewise at Ardmore covering the Chickasaw Nation. These conferences were attended by practically all of the county judges, and after some 10 days' conference, during which all matters and things in detail concerning Indian minor probate conditions were exhaustively discussed, rules of probate procedure were adopted which are said to be more complete protection than exists in any other State. These rules, formulated under my direction after being adopted by the county judges, were approved by the president of the State County Judges' Association, and soon thereafter officially adopted and promulgated by the justices of the Supreme Court of the State of Oklahoma, and have since been in full force and effect, a copy of which rules are herein below set out.

To insure the prosecution of the probate work in a systematic and effective manner a force was organized consisting of the best obtainable attorneys, each of whom was chosen on his merits after careful and exhaustive investigation, to assist and cooperate with the county judges. This force was made up in part of attorneys employed at the [fol. 62] expense of the several tribes and partly at the expense of the United States under authority of Section 18 of the Act of Congress of June 30, 1913.

Widespread and gratifying results have already been accomplished. Wrongdoers have been prosecuted; estates have been recovered; dishonest and incompetent guardians have been removed; worthless bonds have been replaced with responsible bondsmen; and many thousands of dollars have been saved to Indian minors and invested for their benefit. These direct results are also increased to an ex-

tent which can only be approximated by the moral influence which has resulted, operating powerfully to prevent a repetition of wrongdoing and to insure better conditions in the future.

As a result of this gratifying progress, together with the public approval now almost universal in Oklahoma, it is confidently believed that the next legislature will enact laws in harmony with these probate rules and that permanent protection of the property of Indian minors will be assured.

The following are the rules of probate procedure now being enforced in the courts of Oklahoma, and it is my firm purpose to make unrelenting effort in behalf of these Indian children:

Rules of Procedure in Probate Matters Adopted by the Justices of the Supreme Court of Oklahoma

Now, on this 11th day of June, 1914, the justices of the Supreme Court, pursuant to Section 5347, Revised Laws of Oklahoma, 1910, meet at the capital of the State of Oklahoma for the purpose of revising their general rules and making such amendments in addition thereto as may be required for the proper and expeditious conduct of the business of said court and other courts of record of said State. After due consideration, the justices of said Supreme Court promulgated and adopted the following rules:

Rule 1

The — of each — are hereby set apart and designated as the dates on which the court will hear guardian's reports; provided that such reports have been on file and notice given, as provided in Rule 3.

Rule 2

All guardians are required to make annual, or semiannual reports, unless otherwise directed, under oath, showing fully and completely the description, character, kind, and value of all property held for their wards. All items of [fol. 63] receipts and disbursements must be in detail and receipts produced and filed for sums paid out. All securities and assets should be listed in each report, and copies of

deeds, mortgages, etc., evidencing same recorded and attached thereto as exhibits. Upon an approval of any order of court to invest the funds of a ward, guardians shall attach to their reports copies of evidence of title or other investment. The date and amount of guardian's bond, premium paid, if any, as well as the names, addresses, and solvency of sureties thereon, must be given. The name, age, sex, of the ward and relationship, if any, to the guardian should be stated, and the school advantages disclosed. All reports must be self-explanatory. A failure or refusal to file reports as due will be grounds for removal.

Rule 3

Upon the filing of the reports and fixing of the date for hearing thereof, the judge shall cause notice to be given of the date of such hearing to the persons having custody of the ward, the representative of the Interior Department or probate attorney, at least 10 days before the date of the hearing. Any person or persons interested may appear and make objections, if so desired, to the approval of such reports, and offer evidence to support such objections.

Rule 4

No receipts from the ward upon the final accounting of a guardian will be accepted or considered unless the ward be brought into open court, and upon the hearing of said final receipt, the stenographic notes shall be transcribed and a copy thereof filed with the papers in the case. In the consideration of any reports, annual or final, any item included in any previous reports may be reviewed.

Rule 5

Petitions for the sale of land, of minors and incompetents will be heard — of each —. On the hearing on petitions for sale, the guardian, person in custody, and the ward himself, when over 14 years of age, must be present and must be examined as to the necessity for said sale and the truth of the allegations of the petition, and furnish such additional evidence as the court may require. The evidence offered must be taken down and transcribed and a copy thereof

filed with the papers in the case. No bid will be considered by the court unless a certified check in the amount of 10 per cent of the amount of the bid be deposited either in court or with the guardian offering the land for sale.

[fol. 64]

Rule 6

In the sale of minors' lands or minors' interest in land, the guardians shall be required to render to the court for his approval before confirmation of sale, an account of sale showing each item of expense incurred in such sale, and in no case shall abstract fees be charged against the minor's estate, except by a special agreement with the court at or prior to the time of filing bid. Confirmation will not be had except on the —.

Rule 7

Under the sale of real estate by guardian, no fees in excess of the following schedule of fees will be allowed attorneys:

	Per cent
On the first $500, or less	10
From $501 to $1,500, inclusive	5
From $1,501 to $3,000, inclusive	2
For all above $3,000	1

But in no case shall the fee exceed the sum of $300. The minimum fee will be $25, unless the court in granting the petition for the sale shall stipulate that the fee and costs incident thereto shall be borne by the purchaser.

Rule 8

No petition for the sale of ward's property or voucher for the payment by the Interior Department of money to the guardian will be considered if said guardian is delinquent in making reports or filing inventory as required by law.

Rule 9

No oil and gas or other mineral lease covering lands belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible

bidder. All petitions for the approval of oil and gas leases shall be filed at least five days before the same are sold, as provided herein, and notice of such sale must be given by posting and by publication, where publication is practicable, and shall be on — of each —.

Rule 10

Deeds conveying inherited lands of full-blood Indian heirs shall be approved only on the verified petitions of grantors, which shall set forth the names of the parties, description of the land, roll number of the decedent and grantors and quantum of blood, the permanent residence of the deceased allottee at the time of death, and the char- [fol. 65] acter and extent of the interest sold. Said petitions shall be set down for hearing not less than 10 days from the date of filing, and on one of the two days hereinbefore provided for the confirmation of sale by guardian, advertised in the county where the land is located for one week, and probate attorney or local counsel for the tribe of which the grantor is a member shall be notified upon the filing of the petition. Said land shall be appraised, and testimony of disinterested persons may be required as to the value of the land conveyed when deemed necessary by the court. The grantors shall be present and be examined in open court, and before such deeds shall be approved, and the court must be satisfied that the consideration has been paid in full in the presence of the court. No petition will be considered when any deed has been previously placed of record upon the land or taken within 30 days aftere the death of the allottee. The evidence shall be transcribed by the stenographer and filed of record in the case, the expense of which, including attorneys' fees, must be borne by the grantee. When it shall appear for the best interests of the Indian, approval will be withheld unless the grantor agrees in writing for the deposit of the proceeds derived from the sale of the land, to be expended subject to the approval of the County Court.

Rule 11

Guardians shall not expend for or on account of their wards any sum unless first authorized by the court, except

in case of sickness of the ward, or other emergency, in which event notice must be given immediately to the court.

Rule 12

The national attorney or any of the probate attorneys for the Five Civilized Tribes or the representative of the Department of the Interior (or Department of Justice in the Seminole Nation) will be recognized in any matter involving the person or property of a citizen of such nation.

Rule 13

Trust funds must be deposited by the guardian as trustee, and not to his personal account; and where an individual is guardian for several persons or estates, the accounts shall be deposited and kept separate and apart.

Rule 14

In the settlement of a guardian's account, where the guardian is the parent of the ward, no allowance will be made from the ward's estate for board and keep, except it is made to appear a positive injustice would result from [fol. 66] the enforcement of such rule and unless said parent is unable to support said ward.

Rule 15

All guardians shall be required to secure loans for funds in their hands belonging to their wards with real-estate first mortgage security, not to exceed 50 per cent valuation of the land, approved by the County Court, for such length of time as will insure the collection of the principal and interest before the arriving at majority of the wards.

Rule 16

No will or other instrument purporting to be a will covering the lands of a restricted Indian of the Five Civilized Tribes, whether such lands be his individual allotment or inherited land, when submitted by the allottee or other person to the proper probate court, as required under existing law, shall receive the acknowledgment of nor be admitted

to probate by such probate court until after notice shall have been given to the local probate or tribal attorneys for the tribes or for the Department of the Interior, or a representative thereof.

Rule 17

These rules shall also apply to executorships and administrations in so far as they are applicable, especially inasmuch as sales of property and accountings are concerned.

Rule 18

All advertisements not required by law may be waived with the consent of the County Court upon the approval of the probate attorney or tribal attorney.

It is ordered and directed by the Supreme Court that the judge of any court wherein said rules may be applicable shall, immediately after conference with the probate attorney assigned to his county or district by the Commissioner of Indian Affairs, fill in all blank spaces in said rules left vacant by the justices of the Supreme Court to suit the conveniences of said judges and facilitate the efficient and orderly transaction of business in their respective courts.

And it is further ordered and directed that the rules so promulgated and adopted shall apply to the Supreme Court, District Courts, Superior Courts, County Courts, and all other courts of record throughout the State in which they may be applicable, and that they shall be of full force on and after the 15th day of July, 1914.

[fol. 67] Certificate

State of Oklahoma,
County of Tulsa, ss:

I, W. H. L. Campbell, clerk of the Supreme Court for and in the State of Oklahoma, do hereby certify that the foregoing is a full, true, correct, and complete copy of certain rules promulgated and adopted by the justices of said Supreme Court for the proper and expeditious conduct of the business of said court and other courts of record of said State as the same appear of record in my office,

In testimony whereof I hereunto set my hand and affix the seal of said court this 24th day of June, 1914.

W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma. (Seal.)

Defendant Exhibit #1

P. O. & G. Co.—No. M16-5M-4-32. No. 119 Tulsa Co.

Transfer Order

Tulsa, Ok., May 13, 1922.

To the Prairie Oil & Gas Company:

The undersigned ha- sold and transferred — interest in Wells Nos. 1 and up on Albert T. Twist Farm, located in N. 2 of the N. E. 4 of the S. E. 4 and the S. W. 4 of the *of the* S. E. 4 of the N. E. 4, Sec. 24-20-12 East, Tulsa County, Oklahoma, as below:

Interest	To whom transferred	P. O. address (Give box No. or street address)
Entire Royalty Interest	Title Guarantee & — Company #2	Tulsa Oklahoma (Cosden Bldg.)

You will therefore give credit for oil received from said interest as above, beginning at 7:00 o'clock A. M., on the 16th day of May, 1922.

A. T. T. Albert T. Twist.
(Seller sign above.)

Witness: Henry F. Thomas.

The undersigned certify that they are the legal owners of the interests above transferred and warrant the title thereto, and The Prairie Oil and Gas Company is hereby authorized, until further notice, to receive oil from said [fol. 68] wells for purchase from said parties, subject to the following conditions:

First. The oil run in pursuance of this division order shall become and be the property of The Prairie Oil and Gas Company upon the delivery thereof to it or any other common carrier pipe line designated by it.

Second. The oil purchased and received in pursuance of this division order shall be delivered F. O. B. to any pipe line designated by The Prairie Oil and Gas Company, which may be able and willing to gather and receive the same, and shall be paid for to the well owners or their assigns in proportion to their respective interests shown above, at the market price paid by The Prairie Oil and Gas Company for the same kind and quality of oil on the same day that said oil, purchased in pursuance of this division order, is delivered as aforesaid. Settlement therefor shall be made semi-monthly by mailing or delivery to the persons from whom such oil is so purchased, their heirs, assigns or legal representatives, on or before the 25th day of each month, a bank check or draft for the amount due on account of oil so purchased during the first fifteen days of the month, and in like manner, on or before the 10th day of each month, for all oil so purchased and delivered after the fifteenth day of the preceding month. Pipe line grades and measurements to govern and control in all settlements.

Third. The Prairie Oil and Gas Company, shall deduct three per cent. from all oil received from wells into the pipe lines for its account on account of dirt and sediment, and, in addition, shall deduct one-twentieth of one per cent. for each degree of artificial heat above normal temperature to which said oil shall have been subjected, and oil shall be steamed when necessary to render it merchantable.

Fourth. It is understood and agreed in case of adverse claim of title to the land from which any such oil may be produced, or adverse claim of title to any oil sold and purchased in pursuance of this division order, The Prairie Oil and Gas Company may retain the purchase price of such oil until such adverse claim is fully settled and determined, or until the party or parties claiming to be owners thereof shall furnish satisfactory indemnity.

Title Guarantee & Trust Company, by J. M. Winters, Vice-Pres.

(Buyer sign above.)

Witness: Henry F. Thomas.

Attest: U. H. Day, Secy.

Approved: W. H. Love, Attorney, 5/15/22.

6—986

[fol. 69] DEFENDANT'S EXHIBIT #2

WHL—P. O. & G. Co.—No. M16 20m 2 15. #9 Los Angeles Cherokee

Transfer Order

6 o'clock a. m. Jan. 15, 1917.

To the Prairie Oil & Gas Company:

The undersigned ha- this day sold — interest in Wells Nos. 1 and up on Albert T. Twist, a minor Farm, located in North Half (N. 2) of Northeast Quarter (N. E. 4) of the Southeast Quarter (S. E. 4) and Southwest Quarter (S. W. 4) of Southeast Quarter (S. E. 4) of Northeast Quarter (N. E. 4) of Sec. 24 20 12, Cherokee Nation, Tulsa County, Oklahoma, as below:

Interest	Purchaser sold	P. O. address
7/8 W. I.	The Prairie Oil & Gas Company	Independence, Kansas.

1/8 Royalty, Albert T. Twist, minor, Tulsa, Oklahoma.

You will therefore give credit for oil received from said interest as above.

The Los Angeles Cherokee Oil Company, by J. F. Pitt, Asst. Sect. Leoria L. Twist Weldy.

Attest: —— —— Secretary.
Tank Nos. —.

The undersigned lessor consents to the assignment of lease covering the above described land and The Prairie Oil and Gas Company is hereby authorized, until further notice, to remove oil from said wells for purchase from said parties severally in the proportions named, subject to the following conditions:

First. The oil run to any pipe line for transportation in pursuance of this division order shall become and be the property of The Prairie Oil and Gas Company as soon as the delivery thereof to the pipe line of The Prairie Pipe Line Co. for account of said The Prairie Oil and Gas Company, shall have been completed.

Second. The oil purchased and received in pursuance of this division order shall be delivered F. O. B. the pipe lines of The Prairie Pipe Line Co. and shall be paid for to the well owners or their assigns in proportion to their respective interests shown above, at the market price paid by The Prairie Oil and Gas Company for the same kind and quality of oil on the same day that said oil, purchased in pursuance of this division order, is delivered as aforesaid. [fol. 70] Settlement therefor shall be made semi-monthly by mailing or delivery to the person from whom such oil is so purchased, their heirs, assigns, or legal representatives, on or before the 25th day of each month, a bank check or draft for the amount due on account of oil so purchased during the first fifteen days of the month, and in like manner, on or before the 10th day of each month, for all oil so purchased and delivered after the fifteenth day of the preceding month. Pipe line grades and measurements to govern and control in all settlements.

Third. The Prairie Oil and Gas Company shall deduct three per cent from all oil received from wells into the pipe lines for its account on account of dirt and sediment, and, in addition, shall deduct one twentieth of one per cent for each degree of artificial heat above normal temperature to which said oil shall have been subjected, and oil shall be steamed when necessary to render it merchantable.

Fourth. It is understood and agreed in case of adverse claim of title to the land from which any such oil may be produced, of adverse claim of title of any oil sold and purchased in pursuance of this division order, The Prairie Oil and Gas Company may retain the purchase price of such oil until such adverse claim is fully settled and determined, or until the party or parties claiming to be owners thereof shall furnish satisfactory indemnity.

Leoria L. Twist Weldy, Guardian of Albert T. Twist, a minor. The Prairie Oil & Gas Company, by ————, Vice President.

Witness: John Schmitz.
Approved: W. H. Lowe, Attorney.
Attest: ————, Secretary.

Received Mar. 19, 1917. Accepted on and after 1 15 17.

DEFENDANT'S EXHIBIT #3

P. O. & G. Co.—No. M16 20m 2 15. 119 Tulsa

Transfer Order

Nov. 1, 1918.

To the Prairie Oil & Gas Company:

The undersigned has this day sold royalty interest in Wells Nos. 1 and up on Albert T. Twist Farm, located in N. 2 N. E. 4 S. E. 4 and S. W. 4 S. E. 4 N. E. 4 24-20-12, — Nation, Tulsa County, Oklahoma, as below:

Interest	To whom sold	P. O. address
1/8 Royalty	Albert T. Twist	418 West 2nd, Tulsa, Okla.

[fol. 71] This transfer order to be considered effective beginning at 7 o'clock A. M. on — day of ——, 19—.

You will therefore give credit for oil received from said interest as above.

Leoria L. Twist Weldy, Guardian of Albert T. Twist.

Tank Nos. —.

The Prairie Oil and Gas Company is hereby authorized, until further notice, to receive oil from said wells for purchase from said parties severally in the proportions named, subject to the following conditions:

First. The oil run to any pipe line for transportation in pursuance of this division order shall become and be the property of The Prairie Oil and Gas Company as soon as the delivery thereof to the pipe line of The Prairie Oil & Gas Co. and The Prairie Pipe Line Co. for account of said The Prairie Oil and Gas Company, shall have been completed.

Second. The oil purchased and received in pursuance of this division order shall be delivered F. O. B. the pipe lines of The Prairie Oil & Gas Co. and The Prairie Pipe Line Co. and shall be paid for to the well owners or their assigns in proportion to their respective interests shown above, at the market price paid by The Prairie Oil & Gas Company for the same kind and quality of oil on the same day that said oil, purchased in pursuance of this division order, is delivered as aforesaid. Settlement therefor shall be made

semi monthly by mailing or delivery to the person from whom such oil is so purchased, their heirs, assigns, or legal representatives, on or before the 25th day of each month, a bank check or draft for the amount due on account of oil so purchased during the first fifteen days of the month, and in like manner, on or before the 10th day of each month, for all oil so purchased and delivered after the fifteenth day of the preceding month. Pipe line grades and measurements to govern and control in all settlements.

Third. The Prairie Oil and Gas Company shall deduct three per cent from all oil received from wells into the pipe lines for its account on account of dirt and sediment, and, in addition, shall deduct one twentieth of one per cent for each degree of artificial heat above normal temperature to which said oil shall have been subjected, and oil shall be steamed when necessary to render it merchantable.

Fourth. It is understood and agreed in case of adverse claim of title to the land from which any such oil may be produced, or adverse claim of title of any oil sold and pur- [fol. 72] chased in pursuance of this division order, The Prairie Oil and Gas Company may retain the purchase price of such oil until such adverse claim is fully settled and determined, or until the party or parties claiming to be the owners thereof shall furnish satisfactory indemnity.

Albert T. Twist.

Witness: D. R. Mahoney.

Approved Nov. 8, 1918. W. H. Love, Attorney.

Defendant's Exhibit 4

Voucher No. —. Number 116,778

Independence, Kansas

The Prairie Oil & Gas Company: Independence, Kans.

May 15, 1922.

Pay to the order of Albert T. Twist, $48.46, P. O. & G. Co., $48 and 46 cts., for proceeds of all oil run to and including above date at the market price as shown by ac-

companying statement in accordance with terms of division order.

The Prairie Oil & Gas Company. E. T. Pa—, Treasurer.

(Oil Purchased Account.)

Oil Purchase Check 864. To Commercial National Bank, 8352, Independence, Kansas.

Stamped: First National Bank, Tulsa, May —, 1922. ——— ———, Chief Teller.

Endorsed on back: Albert T. Twist. Perforated: Paid. Stamped: Pay to the order of First National Bank of Tulsa, Oklahoma, for deposit only. Palace Clothing Store. 123. Pay to the order of — bank or trust company. May 29, 1922. The Federal Reserve of Kansas City. Pay to — bank or banker. — guaranteed. May 27, 1922. First National Bank, Tulsa, Okla. 864. Roscoe Adams, Cashier.

[fol. 73] DEFENDANT'S EXHIBIT #5

L W T G T. No. 118 Tulsa 8

Transferable Only with Consent of the Secretary of the Interior

Oil and Gas Mining Lease Upon Land Selected for Allotment, Cherokee Nation, Indian Territory

(Sec. 72, Act of July 1, 1902, 32 Stat. 716, 726)

This indenture of Lease, made and entered into, in quadruplicate, on this 30th day of September, A. D. 1904, by and between William G. Twist, of Tulsa, Indian Territory, party of the first part, and Los Angeles Cherokee Oil Company, Los Angeles, California, a corporation duly organized and existing under the laws of California, and duly authorized to carry on business in the Indian Territory, by compliance with the Act of Congress, approved February 18, 1901, (31 Stat. 794) party of the second part, under and in pursuance of the provisions of Section 72 of the Act of Congress approved July 1, 1902, and the regulations prescribed by the Secretary of the Interior thereunder,

Witnesseth: That the party of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the party of the second part, its successors and assigns, do hereby demise, grant and let unto the party of the second part, its successors and assigns, for the term of fifteen years from the date hereof, all of the oil deposits and natural gas in or under the following described tract of land, lying and being within the Cherokee Indian Nation and within the Indian Territory, to wit: The Lot 3 of Section (19), Township 20 North, Range 13 E. and the North 15.28 acres of Lot 7, Section 14, Township 20 North, Range 12 East, and the S. 2 of N. E. 4 of S. E. 4 and the N. E. 4 of S. E. 4 of S. E. 4 of Section (24), Township 20 North, Range 12 East, of the Indian Meridian, and containing 80.69 acres, more or less, with the right to prospect for, extract, pipe, store, refine, and remove such oil and natural gas, and to occupy and use so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas as fuel as far as it is necessary to the prosecution of said operations. [fol. 74] In consideration of which the party of the second part hereby agrees and binds itself, its successors and assigns, to pay or cause to be paid to the lessor, as royalty, the sum of ten per cent of the value, on the leased premises, of all crude oil extracted from the said land, and if the parties do not, before the tenth day of the month succeeding its extraction, agree upon the value of the crude oil on the leased premises, the value thereof shall finally be determined under the direction of the Secretary of the Interior in such manner as he shall prescribe, and to so pay the royalty accruing for any month on or before the twenty-fifth day of the month succeeding, and where the value of the crude oil fluctuates, the average value during the month shall constitute the criterion in computing the royalty; and to pay in yearly payments, at the end of each year, such royalty on each gas producing well as the Secretary of the

Interior may prescribe, the lessor to have free the use of the gas for lighting and warming his residence on the premises. But failure on the part of the lessee to use a gas-producing well, where the same cannot be reasonably utilized at the rate so prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil.

And the party of the second part further agrees and binds itself, its successors and assigns, to pay or cause to be paid to the lessor, as advanced annual royalty on this lease, the sums of money as follows, to-wit: Fifteen cents per acre per annum in advance for the first and second years; Thirty cents per acre per annum, in advance, for the third and fourth years; and Seventy five cents per acre per annum, in advance for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advanced royalty and further, that should the party of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, then this lease shall, at the option of the lessor, be null and void, and all royalties paid in advance shall become the money and property of the lessor.

The party of the second part further covenants and agrees to exercise diligence in the sinking of wells for oil and natural gas on the lands covered by this lease, and to operate the same in a workmanlike manner to the fullest possible extent, unavoidable casualties excepted; to commit no waste upon the said land, and to suffer no waste to be committed upon the portion in its occupancy or use; to take good care of the same, and to promptly surrender and return the premises upon the termination of this lease to the party of the first part or to whomsoever shall be lawfully [fol. 75] entitled thereto, and not to remove therefrom any buildings or improvements erected thereon during the said term by the said party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as part of the consideration for this lease, in addition to the other considerations herein specified, excepting that tools, boilers, boilerhouses, pipe lines, pumping and drilling outfits, tanks,

engines, and machinery, and the casing of all dry or exhausted wells, shall remain the property of the said party of the second part, and may be removed at any time before the expiration of sixty days from the termination of the lease; that it will not permit any nuisance to be maintained on the premises under its control, nor allow any intoxicating liquors to be sold or given away for any purpose on such premises; that it will not use such premises for any other purpose than that authorized in this lease, and that before abandoning any well it will securely plug the same so as to effectually shut off all water above the oil bearing horizon.

And it is mutually understood and agreed that no sublease, assignment or transfer of this lease or of any interest therein or thereunder can be directly or indirectly made without the written consent thereto of the lessor and the Secretary of the Interior first obtained, and that any such assignment or transfer made or attempted without such consent shall be void.

And the said party of the second part further covenants and agrees that it will keep an accurate account of all oil mining operations, showing the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and other personal chattels used in prospecting and mining operations, and upon all of the oil obtained from the land herein leased, as security for the payment of said royalties.

And the party of the second part agree that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation.

And the said party of the second part expressly agrees that should it or its sublessees, heirs, executors, administrators, successors, or assigns, violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of sixty days to pay the stipulated monthly royalty provided for herein, then the party of the first part shall be at liberty, in his discretion, to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises, and privileges of the party of the second part, [fol. 76] its sublessees, heirs, executors, administrators,

successors or assigns, hereunder shall cease and end without further proceedings.

If the lessee makes reasonable and bona fide effort to find and produce oil in paying quantity as is herein required of it, and such effort is unsuccessful, it may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all of its then existing obligations hereunder: Provided, however, that approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further agreed and understood that this lease shall be of no force or effect unless the party of the second part shall, within sixty days from the date of approval of the application filed in connection herewith, furnish a satisfactory bond in accordance with the regulations of May 4, 1903, prescribed by the Secretary of the Interior, which shall be deposited and remain on file in the Indian Office during the life of this lease.

In witness whereof the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

William G. Twist. (Seal.) Los Angeles Cherokee Oil Co. (Seal.) Dave Murphy, President. (Seal.) Geo. Frey H. Mutoff, Secretary. (Seal.)

Attest: ——.

Two witnesses to execution by lessor: Joseph J. Downs, P. O. Turley, I. T.; George S. Hine, P. O. Bartlesville, Ind. Ter.

Two witnesses to execution by lessee: Gilbert C. Schmidt, P. O. Los Angeles, Cal.; George N. Parks, Jr., P. O. Los Angeles, Cal. [illegible]s to President and Secretary.

United States of America,
Indian Territory,
Northern Judicial District, ss:

Be it remembered, that on this day came before me, the undersigned a notary public within and for the Northern Judicial District of the Indian Territory aforesaid, duly

commissioned and acting as such William G. Twist, of Tulsa, Ind. Ter., to me personally well known as the party lessor in the within and foregoing indenture of oil and gas mining lease, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

[fol. 77] Witness my hand and seal as such notary public on this 30th day of September, 1904. Beulah A. Reynolds, Notary Public. (Seal.) My commission expires March 18th, 1908.

Affidavit of Witness

United States of America,
Indian Territory,
Northern Judicial District, ss:

Joseph J. Downs of Turley, Ind. Ter., and George S. Hine of Bartlesville, Ind. Ter., witnesses to the attached lease executed by William G. Twist to Los Angeles Cherokee Oil Company, being by me first duly sworn, upon their oaths state, each for himself: That said oil and gas mining lease was in their presence read and fully explained to the lessor, and that he understood the nature, contents and effects thereof, and approved of the same.

Joseph J. Downs, George S. Hine.

Subscribed in my presence and sworn to before me this 30th day of September, 1904. Beulah A. Reynolds, Notary Public. My commission expires March 18th, 1908. (Seal.)

Certificate of Officer Taking Acknowledgment

United States of America,
Indian Territory,
Northern Judicial District, ss:

I, Beulah A. Reynolds, of Vinita, Ind. Ter., a notary public within and for the Northern District of the Indian Territory, do hereby certify that Joseph J. Downs of Turley, Ind. Ter., and George S. Hine, of Bartlesville, Ind. Ter., witnesses to the attached oil and gas mining lease, executed by William G. Twist to Los Angeles Cherokee Oil

Company signed the same in my presence at the request of the lessor; that they are personally well known to me; that I know of my own knowledge that they are reputable persons and entitled to full faith and credit.

Witness my hand and seal as such notary public on this 30th day of September, 1904.

Beulah A. Reynolds, Notary Public. My commission expires March 18th, 1908. (Seal.)

Endorsed on back: Quadruplicate. Department of the Interior, Washington, D. C. Oil and Gas Mining Lease, Cherokee Nation, I. T. William G. Twist of Tulsa, Ind. Ter., to Los Angeles Cherokee Oil Company, of Los Angeles, California, of Lot 3, of Sec. 19, T. 20 N., R. 13 E., and the N. 15.28 acres of Lot 7, Sec. 14, T. 20 N., R. 12 E., and the S. 2 of N. E. 4 of S. E. 4 and the N. E. 4 of S. E. 4 of S. E. 4 Sec. 24, Tp. 20 N., Range 12 E., in the Cherokee Nation, Indian Territory, containing 80.69 acres. Dated [fol. 78] September 30th, 1904. Expires September 30th, 1919. Reg. No. 364. Department of the Interior, U. S. Indian Service, Union Agency, Muskogee, I. T., Dec. 2, 1904. The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date. J. Fentress Wisdom, U. S. Indian Agent, Clerk in Charge. Department of the Interior, Office of Indian Affairs. Washington, D. C., December 23, 1904. Respectfully submitted to the Secretary of the Interior with recommendation that it be approved. N. O. Tonner, Acting Commissioner. L. R. S. Department of the Interior, Washington, D. C., Dec. 30, 1904. Approved. Thos. Ryan, Acting Secretary of the Interior. Rec. by Los Angeles Cherokee Oil Co. 5-18-04. Stamped: 39014. 1905. Indian Office, 85727. 1904. Incl. No. 2. Received ——, 1904. Office of U. S. Indian Agent, Muskogee, Ind. Ter. Department of the Interior. Received Dec. 24, 1904. Enc. No. 2 of No. 12924. Indian Territory Division. No. —. Received May 2, 1904. Office of U. S. Indian Agent, Muskogee, Ind. Ter. No. 41887. Received Dec. 3, 1904. Office of U. S. Indian Inspector for Indian Territory.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Petition for Appeal of Edward C. Twist et al.—Filed June 23, 1923

To the Honorable R. L. Williams, District Judge for the Eastern District of the State of Oklahoma:

The above named plaintiffs, feeling themselves aggrieved by the decree made and entered in the above styled causes, on the 27th day of April, 1923, do hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, which is filed herewith. The plaintiffs pray that said appeal be allowed and that citation issue, as provided by law, and that a transcript of record, proceedings and papers upon which said decree was based, duly authenticated, may [fol. 79] be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, in the State of Missouri.

And your petitioners further pray that proper order, touching the security to be required of them to perfect their appeal, be made.

James S. Watson, Linebaugh & Pinson, Attorneys for Plaintiffs.

[File endorsement omitted.]

In United States District Court

Assignment of Errors—Filed June 23, 1923

And now on this 23d day of June, 1923, come the plaintiffs, by their attorneys, James S. Watson and Linebaugh & Pinson, and say that the decree entered in the above cause on the 27th day of April, 1923, is erroneous and unjust to the said plaintiffs:

1. Because the Court erred in holding, adjudging and decreeing that the County Court of Tulsa County, Oklahoma, had jurisdiction on the 16th day of June, 1916, to

enter an order directing Leoria L. Twist Weldy, as guardian of Albert T. Twist, Edward C. Twist and Jessie L. Twist, to enter into an agreement with the Los Angeles-Cherokee Oil Company, extending the terms of certain oil and gas mining leases covering the estates of said minor wards.

2. Because the court erred in holding, adjudging and decreeing that an extension of the terms of the oil and gas mining lease upon the lands of the said named wards was valid, though not made nor executed in compliance with the rules of the Supreme Court of the State of Oklahoma and the Statutes of the State of Oklahoma, relative to the sales of personal and real property of minor wards.

3. Because the court erred in holding, adjudging and decreeing that the County Court of Tulsa County, Oklahoma, on the 16th day of June, 1916, had jurisdiction to direct the sale or grant of oil and gas leases, as administrator and as guardian, acting conjointly, so that the same should cover, in addition to the lands of the above named minors, the lands of William G. Twist, the father of said minors, in whose lands the said wards inherited an undivided interest.

4. Because the Court erred in holding, adjudging and decreeing that certain oil and gas mining leases, or extension agreements, made and executed prior to the termination of [fol. 80] oil and gas leases then existing on the lands of said minor wards, and over-lapping with said leases, are valid and of full force and effect.

5. Because the Court erred in failing and refusing to hold that certain minor Indian wards, restricted under the laws of Congress, were not subject to the protection afforded by certain probate rules enacted by the Supreme Court of Oklahoma, at the special instance and request of the Commissioner of Indian Affairs of the United States, as a part of the program of the United States for the protection of said minor Indian wards.

6. Because the Court erred in holding, adjudging and decreeing that said rules were directory merely, and were not jurisdictional, in the face of the determination by the Supreme Court of the State of Oklahoma, that said rules are and have always been jurisdictional.

7. Because the Court erred in holding, adjudging and decreeing that an oil and gas mining lease, made for a grossly inadequate consideration, without compliance with the Statutes and probate rules of the State of Oklahoma, was nevertheless valid and enforceable.

8. The Court erred in holding, adjudging and decreeing that the action herein constitutes a collateral attack upon the so-called decree of the County Court of Tulsa County, Oklahoma.

9. Because the Court erred in holding, adjudging and decreeing that the County Court of Tulsa County, Oklahoma, ever in fact made any order under and by virtue of which the guardian of the above named minor wards was authorized to execute the said extension lease.

10. Because the Court erred in holding, adjudging and decreeing that certain statements made by representatives of the Los Angeles Cherokee Oil Company to Leoria L. Twist Weldy, as guardian of the minor wards above named, to the effect that if the leases were not extended they would place vacuums on the wells, the effect of which would be to destroy the wells; and the further statement that the sum of $18,000.00 was more than the extension leases were worth, and the further insinuations and statements that other people were seeking the guardianship of her minors, which caused a fear in the mind of the guardian that the guardianship of her own children might be taken from her, or the wells destroyed, if she did not make the extension leases, and each and all of said suggestions, taken together, did not constitute such fraud or duress upon the guardian [fol. 81] as, coupled with the inadequacy of consideration, was sufficient to nullify the lease or extension agreement.

11. Because the Court erred in holding, adjudging and decreeing that an extension oil and gas lease, made without an order of sale and without competitive bidding, conveyed title to the oil and gas, together with the equipment, real and personal property, of the said minor wards.

12. The Court erred in holding, adjudging and decreeing that the guardian of the minor wards, joined by the administrator of the estate of William G. Twist, deceased, had the power, or that the County Court of Tulsa County

had the authority, to consummate a sale of the various interests in William G. Twist's estate, and in the lands of Albert T. Twist, Edward C. Twist and Jessie L. Twist, jointly, for the lump sum of $18,000.00, without any appraisement of the various properties, without any opportunity for an open market, resulting in the arbitrary division of the amount so received, without regard to the value of the respective properties.

13. Because the Court erred in refusing to permit the witness, Albert T. Twist, to testify as to the statements of Mr. Pitt, made to him a short time before the petition for extension of lease was filed, and which he communicated to his mother.

14. Because the Court erred in failing and refusing to permit the witness Phillips to testify as to the market value of the leases so sold in the year 1916.

15. Because the Court erred in failing and refusing to set aside and vacate the lease, or extension agreement, executed by the said guardian and administrator, together with the purported order of court relating thereto, for the reason that the lease was wholly void and the order of the court so made was without jurisdiction.

Wherefore, the plaintiffs pray that the said decree be reversed and that this court render a proper decree on the record, cancelling said lease, and granting judgment to the plaintiffs for the sum of money which the record shows to be due to them since the expiration of the original lease on the land involved, and for such other relief as to the Court may seem proper and just.

James S. Watson, Linebaugh & Pinson, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 82] In United States District Court

Order Allowing Appeal—Filed June 23, 1923

On this the 23rd day of June, 1923, came on to be heard the petition of the plaintiffs above named for an order allowing appeal, and thereupon, it was by the Court ordered

that said petition be granted and the appeal allowed upon the plaintiffs giving bond, conditioned as required by law in the sum of two hundred fifty dollars.

R. L. Williams, Judge.

[File endorsement omitted.]

Bond on appeal for $250.00, approved and filed August 13, 1923, omitted in printing.

[fol. 83] In United States District Court

[Title omitted]

Stipulation as to Printing Record—Filed August 13, 1923

It is hereby stipulated and agreed by and between the undersigned, attorneys for plaintiffs as appellants, and the defendant, as appellee and cross appellant in case #2929, that the record on appeal shall be complete and full when certified by the Clerk to contain, according to the terms of this stipulation, the following portions of the record of the proceedings in this case, and none other, to-wit:

1. The petition of the plaintiff.
2. The answer and cross petition of the defendant.
3. The reply and answer of the plaintiff.
4. The full and complete evidence as taken and transcribed and filed in this cause by the plaintiff, instead of a reduced statement thereof.
5. Judgment or decree of the Court.
6. The petition of plaintiff for appeal, assignments of error and order allowing appeal.
7. Appeal bond.

[fol. 84] 8. Petition of defendant for cross appeal in case #2929, assignment of errors, order allowing appeal and supersedeas bond.

9. This stipulation.

It is further stipulated and agreed that the lodgment of the transcript, suggestions and amendments, citation and filing of praecipe for printing the record are waived, and

that the Clerk may proceed to print the record and certify the same in accordance with this stipulation and transmit the same to the United States Circuit Court of Appeals.

It is further stipulated and agreed that by reason of the four cases mentioned in the caption having been consolidated for trial and presenting the same questions of law and fact, the record in each of the said four cases shall be similarly printed; that is to say, that the record shall be the record of the consolidated cases, and the requisite number of copies in each case shall be bound and entitled in the particular cases, and it is further stipulated that the four cases shall be consolidated on appeal and presented as a consolidated case with the approval of the Appellate Court, the same record to be used by both parties on their respective appeals.

Each and every provision and term of this stipulation shall be subject to the approval of the trial court.

James S. Watson, Linebaugh & Pinson, Attorneys for Appellants. West, Sherman, Davidson & Moore, Attorneys for Appellee and Cross-appellant in Case #2929.

ORDER

It is ordered that the terms and provisions contained in the foregoing stipulation be and they are hereby approved, this the 31st day of August, 1923.

R. L. Williams, Judge.

[fol. 83] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PRAIRIE OIL & GAS CO. FOR APPEAL.—Filed July 24, 1923

To the Honorable Robert L. Williams, District Judge:

The above named The Prairie Oil & Gas Company, defendant in the above entitled cause, feeling itself aggrieved by a certain decree made and entered in this cause on April

27, 1923, to-wit, that portion of the decree adjudging that the plaintiffs, Kuroki Twist and Willie V. Twist above named, were the owners of an undivided four-fifteenths interest in the lands in controversy free and clear of the claims of the said The Prairie Oil & Gas Company under its lease, and adjudging that they had a right to recover of the said defendant The Prairie Oil & Gas Company four-fifteenths of the net proceeds of the oil and gas produced from the leased premises since September 29, 1919, does hereby appeal from said decree in so far as it adjudges the title of the said Kuroki Twist and Willie V. Twist to be superior to the lease of the defendant, The Prairie Oil & Gas Company, and from the judgment in favor of said Kuroki Twist and Willie V. Twist for four-fifteenths of the net proceeds of the oil taken from said land, for the reasons specified in the assignment of errors filed herewith; and it prays that its appeal be allowed and that the transcript of the record and proceedings upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri, or that said transcript of the record prepared by the plaintiffs in the above cause on their appeal from said decree adjudging the defendant The Prairie Oil & Gas Company to have a valid oil and gas lease as to the remaining eleven-fifteenths interests in the land in controversy, may be used by said The Prairie Oil & Gas Company on this its cross appeal, and said The Prairie Oil & Gas Company further prays that the proper order be made by this court concerning the security required of it to perfect its said cross appeal.

T. J. Flannelly, Paul B. Mason, Preston C. West, Roger S. Sherman, Grey Moore, A. A. Davidson, Attorneys and Solicitors for Defendant, The Prairie Oil & Gas Company.

[fol. 86] Upon reading of the above petition it is ordered that the said appeal be, and the same is hereby allowed, the Prairie Oil & Gas Company having herewith presented its bond on appeal in the sum of ten thousand ($10,000.00) dollars, duly executed by it and with J. J. McGraw as surety, and conditioned as required by law;

It is further ordered that the same be and hereby is approved and that said bond shall be taken and shall operate as a supersedeas bond in said cause.

Dated this 24th day of July, 1923.

R. L. Williams, Judge.

[File endorsement omitted.]

In United States District Court

Assignment of Errors of Prairie Oil & Gas Co.—Filed July 24, 1923

Comes now the defendant The Prairie Oil & Gas Company, and in connection with its petition for appeal in this cause assigns the following errors upon which it will rely on its prosecution of its appeal in said cause, and says that the decree entered in said cause on the 7th day of April, 1923, is erroneous in the following particulars and for the following reasons:

I

Because the court erred in finding, holding and concluding to be null and void the order and judgment of the County Court of Tulsa County, Oklahoma, of March 13, 1917, which authorized the duly appointed guardian of Kuroki Twist and Willie V. Twist, minors, to execute on behalf of her said wards an agreement with Los Angeles Cherokee Oil Company extending the term and period of a certain oil and gas lease then owned and held by said Los Angeles Cherokee Oil Company.

II

Because the court erred in finding, holding and concluding to be void and of no effect the agreement executed on March 13, 1917, by and between Leoria L. Weldy as the duly appointed, qualified and acting legal guardian of Kuroki Twist and Willie V. Twist, minors, and Los Angeles Cherokee Oil Company, extending the term and period of an oil and gas lease on the land in controversy.

[fol. 87]

III

Because the court erred in finding and concluding and deciding that the interest and title of Kuroki Twist and Willie V. Twist in and to the lands in controversy, to-wit, the four fifteenths interest therein, was owned and held by them free and clear of the oil and gas lease of The Prairie Oil & Gas Company upon said lands.

IV

Because the court erred in concluding and adjudging that the oil and gas lease of The Prairie Oil & Gas Company was a cloud upon the title of the said Kuroki Twist and Willie V. Twist in and to the lands in controversy and in decreeing the removal of the same as such cloud.

V

Because the court erred in finding, concluding and deciding that Kuroki Twist and Willie V. Twist were entitled to a four fifteenths interest in the net proceeds of the oil and gas produced from the lands in controversy by The Prairie Oil & Gas Company from and after September 29, 1919, and in rendering judgment against it and in favor of said Kuroki Twist and Willie V. Twist for the sum of $6,967.78, as the amount of said proceeds.

Wherefore, said defendant The Prairie Oil & Gas Company prays that the errors complained of in said assignment of errors be reviewed and that the said decree in so far as it is erroneous as above complained of, be reversed, and for all other and proper relief.

T. J. Flannelly, Paul B. Mason, Preston C. West, Roger S. Sherman, Grey Moore, A. A. Davidson, Attorneys and Solicitors for Defendant, The Prairie Oil & Gas Company.

[File endorsement omitted.]

Bond on Appeal for $10,000, approved and filed July 24, 1923, omitted in printing.

[fol. 88] In United States District Court

[Title omitted]

[fol. 89] Additional Stipulation as to Printing Record—Filed August 24, 1923

In addition to the stipulation heretofore filed herein, relative to the record in this cause for appeal to the Circuit Court of Appeals for the Eighth Circuit, and for the purpose of further simplifying the record in the above cases, which it is anticipated will be consolidated for briefing and argument.

It is hereby stipulated and agreed by and between the parties hereto that the record, as agreed by prior stipulation entered into herein and approved by the Court, shall be printed in full in No. 2929, Edward C. Twist, Kuroki Twist and Willie V. Twist, minors, by Leoria L. Twist Weldy, Guardian, Albert T. Twist and Jessie L. Payne, nee Twist, plaintiffs, vs. Prairie Oil & Gas Company, a corporation, defendant, and that in each of the other cases above referred to the record shall consist of the pleadings, the former stipulation and this stipulation, and that the record in No. 2929 shall be and become a part of the record in each of the other cases above styled, by reference thereto.

It is intended hereby to avoid the incorporation of all exhibits and all of the evidence in each record of each particular case.

Dated this 18th day of August, 1923.

Jas. S. Watson, Linebaugh & Pinson, Attorneys for Appellants. West, Sherman, Davidson & Moore, Attorneys for Appellee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE OF PRAIRIE OIL & GAS CO. FOR TRANSCRIPT OF RECORD—Filed July 24, 1923

To W. V. McClure, Clerk of United States Court for the Eastern District of Oklahoma:

Please include in the transcript in the above entitled cause on cross appeal of the defendant, The Prairie Oil & Gas Company, the following portions of the record:

[fol. 90] 1. Petition of Prairie Oil & Gas Company for appeal.
2. Order allowing appeal.
3. Assignment of errors by Prairie Oil & Gas Company.
4. Bond on appeal.
5. This praecipe.
6. Certificate of clerk.

T. J. Flannelly, Paul B. Mason, Preston C. West, Roger S. Sherman, Grey Moore, A. A. Davidson, Attorneys for Prairie Oil & Gas Company.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] In United States District Court

[Title omitted]

[fol. 89] Additional Stipulation as to Printing Record—Filed August 24, 1923

In addition to the stipulation heretofore filed herein, relative to the record in this cause for appeal to the Circuit Court of Appeals for the Eighth Circuit, and for the purpose of further simplifying the record in the above cases, which it is anticipated will be consolidated for briefing and argument.

It is hereby stipulated and agreed by and between the parties hereto that the record, as agreed by prior stipulation entered into herein and approved by the Court, shall be printed in full in No. 2929, Edward C. Twist, Kuroki Twist and Willie V. Twist, minors, by Leoria L. Twist Weldy, Guardian, Albert T. Twist and Jessie L. Payne, nee Twist, plaintiffs, vs. Prairie Oil & Gas Company, a corporation, defendant, and that in each of the other cases above referred to the record shall consist of the pleadings, the former stipulation and this stipulation, and that the record in No. 2929 shall be and become a part of the record in each of the other cases above styled, by reference thereto.

It is intended hereby to avoid the incorporation of all exhibits and all of the evidence in each record of each particular case.

Dated this 18th day of August, 1923.

Jas. S. Watson, Linebaugh & Pinson, Attorneys for Appellants. West, Sherman, Davidson & Moore, Attorneys for Appellee.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Praecipe of Prairie Oil & Gas Co. for Transcript of Record—Filed July 24, 1923

To W. V. McClure, Clerk of United States Court for the Eastern District of Oklahoma:

Please include in the transcript in the above entitled cause on cross appeal of the defendant, The Prairie Oil & Gas Company, the following portions of the record:

[fol. 90] 1. Petition of Prairie Oil & Gas Company for appeal.
2. Order allowing appeal.
3. Assignment of errors by Prairie Oil & Gas Company.
4 Bond on appeal.
5 This praecipe.
6 Certificate of clerk.

T. J. Flannelly, Paul B. Mason, Preston C. West, Roger S. Sherman, Grey Moore, A. A. Davidson, Attorneys for Prairie Oil & Gas Company.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

91 And thereafter the following proceedings were had in cause No. 6499 in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellants.)

In The United States Circuit Court of Appeals for The Eighth Circuit.

Edward C. Twist, et al., Appellants,
No. 6499. vs.
Prairie Oil & Gas Company, a corporation, Appellee.

Prairie Oil & Gas Company, a corporation, Appellant,
No. . . . . vs.
Kuroki Twist and Willie V. Twist, Appellees.

The undersigned, counsel for Edward C. Twist, Albert T. Twist and Jessie L. Payne, nee Twist, Appellants, and Kuroki Twist and Willie V. Twist, Appellees, hereby enter appearance therein in this court, and pray that they be enrolled as of counsel for such appellants and appellees.

JAMES S. WATSON,
D. H. LINEBAUGH,
PAUL PINSON,
F. B. FITE, Jr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 9, 1923.

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92 (Appearance of Counsel for Appellee.)

United States Circuit Court of Appeals, Eighth Circuit.

Edward C. Twist, et al., Appellants,
No. 6499. vs.
Prairie Oil & Gas Company.

The Clerk will enter my appearance as Counsel for the Appellee.

J. T. FLANNELLY,
PAUL B. MASON,
PRESTON C. WEST,
ROGER S. SHERMAN,
GREY MOORE,
A. A. DAVIDSON.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 3, 1923.

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93 (Order of Submission.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1924.
Wednesday, December 3, 1924.

Edward C. Twist, et al., Appellants,
No. 6499. vs.
Prairie Oil and Gas Company.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Edward C. Twist, Appellant,
No. 6500. vs.
Prairie Oil and Gas Company.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Jessie L. Twist Payne, Appellant,
No. 6501. vs.
Prairie Oil and Gas Company.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Albert T. Twist, Appellant,
No. 6502. vs.
Prairie Oil and Gas Company.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

and

The Prairie Oil and Gas Company, Appellant,
No. 6508. vs.
Kuroki Twist, et al.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

These causes, Nos. 6499, 6500, 6501, 6502 and 6508, having been called for hearing in their regular order are argued together, and argument was commenced by Mr. Paul Pinson for Edward C. Twist, et al., continued by Mr. A. A.
94 Davidson, for the Prairie Oil and Gas Company, and concluded by Mr. Paul Pinson for Edward C. Twist, et al.

Thereupon, these causes were submitted to the Court on the transcripts of the records from said District Court and the briefs of counsel filed herein.

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95 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, A. D. 1925.

Edward C. Twist, et al., Appellants,
No. 6499. vs.
Prairie Oil & Gas Company, a corporation, Appellee.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

May Term, A. D. 1925.

Edward C. Twist, Appellant,
No. 6500. vs.
Prairie Oil & Gas Company, a corporation, Appellee.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

May Term, A. D. 1925.

Jessie L. Twist Payne, Appellant,
No. 6501. vs.
Prairie Oil & Gas Company, a corporation, Appellee.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

May Term, A. D. 1925.

Albert T. Twist, Appellant,
96 No. 6502. vs.
Prairie Oil & Gas Company, a corporation, Appellee.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

May Term, A. D. 1925.

The Prairie Oil & Gas Company, Appellant,
No. 6508. vs.
Kuroki Twist, et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Mr. Paul Pinson (Mr. James S. Watson and Messrs. Linebaugh & Pinson were with him on the brief), for Edward C. Twist, et al.

Mr. A. A. Davidson (Mr. T. J. Flannelly, Mr. Paul B. Mason, Mr. Preston C. West, and Mr. Roger S. Sherman were with him on the brief), for The Prairie Oil & Gas Company.

Before Sanborn and Kenyon, Circuit Judges, and Booth District Judge.

Booth, District Judge, delivered the opinion of the Court.

William G. Twist, a citizen of the Cherokee Nation, had an allotment of land.

September 30, 1904, he made an oil and gas lease thereof to the Los Angeles-Cherokee Oil Company to run 15 years.

97 Three of his children, Albert T., Edward C., and Jessie L., as Cherokee citizens, also had allotments of land.

Their father, William G. Twist, as their Guardian, made leases of their allotments to the same Company as follows:

Of Albert T.'s allotment on March 22, 1905, running to September 3, 1918. Albert became of age September 4, 1918.

Of Jessie L.'s allotment on March 22, 1905, running to December 7, 1918. Jessie became of age December 8, 1917.

Of Edward C.'s allotment on March 22, 1905, running to March 21, 1920. Edward was still a minor when this suit was commenced (September, 1922), but became of age prior to the entry of judgment (April 27, 1923).

On or about January 2, 1907, William G. Twist died intestate seized of his allotment, and leaving a widow, Leoria L. Twist, and five children—the three above mentioned and Kuroki and Willie V. The two latter had no allotments, having been born too late.

In June, 1907, the widow was appointed to succeed her husband as guardian of the three children having allotments. She also became administratrix of her husband's estate.

In June, 1910, Final Decree was entered in the County Court of Tulsa County in the matter of the Estate of William G. Twist.

Distribution was made: one third of the rents and profits of the lease belonging to the estate to the widow in lieu of dower; the remaining two-thirds in equal division to the five children; and the remainder in fee in equal division to the five children.

June 5, 1916, petition by Leoria L. Twist was filed in said County Court, reciting that she was the administratrix of the estate of William G. Twist and guardian of the children, Albert, Edward, and Jessie, and praying that an extension of said four leases be authorized.

Proceedings were thereafter had in said Coupnty Court, which resulted in what purported to be an extension agreement confirmed by the Court, covering all of the four leases for a consideration named, for a term so long as oil or gas should be found on the lands.

98 In these proceedings the two children, Kuroki and Willie V., were neither represented nor mentioned.

On March 5, 1917, these four leases as thus extended, were sold and assigned by the Los Angeles-Cherokee Oil Company to the Prairie Oil & Gas Company, defendant in the present suit.

On March 13, 1917, Leoria L. Twist presented to the County Court of Tulsa County another petition, reciting that she was guardian of Kuroki and Willie, that by inadvertence they had not been included in the former extension proceedings. That they were, however, participating in the consideration received on account of the lease belonging to the estate, the same as the other children. Authority was asked to make a similar extension agreement on behalf of Kuroki and Willie, and without further consideration. Proceedings were had which resulted in an order of the Court authorizing an extension agreement on behalf of Kuroki and Willie similar to the one made in June, 1916, and without further consideration.

The defendant Company entered into possession of the lands covered by the four leases, and has operated continuously since September 29, 1917.

Royalties have been paid in accordance with the extension agreement and have been received by Leoria L. Twist on her own behalf and on behalf of the minors, and by Albert and Jessie personally since they became of age.

In August, 1922, four suits were commenced in the State District Court of Tulsa County, Oklahoma, against the defendant Prarie Oil & Gas Company: one by the five children (three of them through their guardian) heirs of William G. Twist, deceased, in which relief was asked against the extension agreement covering the lease belonging to the estate of William G. Twist. The widow, Leoria L. Twist, did not join in

the suit, except in her capacity as guardian. The other three suits are by Albert, Jessie, and Edward (by guardian), seeking relief against the extension agreement covering the leases on their individual allotments respectively.

These four suits were removed from the State Court to the United States District Court for the Eastern District of Oklahoma.

99 By consent of plaintiffs, they were tried together, with the result that decrees were entered as follows:

In the suit by the five heirs the Court found the issues for defendant as to all the plaintiffs except as to Kuroki and Willie V.; adjudged defendant to be owner of the lease as extended, covering an undivided 11 15th interest; quieted the title to the same in defendant; adjudged Kuroki and Willie the owners of 4 15ths interest in the lands covered by the lease, quieted title in them to the same; adjudged that Kuroki and Willie recover from defendant 4 15ths net proceeds from oil and gas produced from said lands since September 29, 1919, to April 1, 1923, viz.: $6,667.78, and reserved for further consideration the amount produced since April 1, 1923.

In each of the three individual suits of Albert, Jessie, and Edward, the Court found all the issues in favor of the defendant; dismissed plaintiff's petition for want of equity at his costs; adjudged defendant to be the owner of the lease as extended, covering the allotment in question, and quieted title to the same in defendant.

From each of the four decrees thus entered, appeal was taken to this court.

It is necessary to examine the character of the suits in order to determine the proper method of disposing of the appeals.

The complaints in the several suits are framed along similar lines, and contain substantially similar allegations.

Each complaint sets up two causes of action.

Taking up the complaint in the suit by the five heirs, the first cause of action alleges: present ownership of the land by plaintiffs; making of the original lease; purported extension of the lease; invalidity of the purported extension, first, because of fraud, and second, because of non-compliance with statutory requirements, and as to Kuroki and Willie that there was no consideration for the extension and that they had no opportunity to protect their rights; entry and con-

tinued possession by defendant constituting trespass; prayer for damages. The second cause of action reasserts the allegations in the first cause of action; alleges that the purported extension of the lease constitutes a cloud on plaintiffs' title; prayer is for, declaration as to ownership, cancellation
100 of extension, quieting of plaintiffs' title, injunction against further trespass or claim by defendant.

It is apparent that the first was a legal cause of action—ejectment; and the second an equitable cause of action—to remove cloud on title.

The uniting of the two in the same complaint was allowable under the Oklahoma Statute, but is not permissible in the Federal Court. Hurt vs. Hollingsworth, 100 U. S. 100; Bucyrus vs. McArthur, 219 Fed. 266, 721; Cehrokee Nation vs. Kansas Railway Co., 135 U. S. 641, 651; Fletcher vs. Burt, 126, Fed. 619; United States vs. Swan, 65 Fed. 647, 652.

When the suits were removed to the Federal Court the pleadings should have been redrawn to conform to the Federal practice. Foster Fed. Practice, p. 3061; Hurt vs. Hollingsworth, supra; Hatcher vs. Hendrie Co., 133 Fed. 267, 271; Fletcher vs. Burt, supra; Perkins vs. Hendryx, 23 Fed. 418.

In some cases both causes of action, legal and equitable, may be maintained after removal, but on different sides of the Court.

In other cases an election may be necessary between the two causes of action.

In the case at bar, only the legal cause of action could be maintained in the Federal Court, so that an election was not feasible.

The equitable cause of action, though perhaps maintainable in the State Court (Compiled Oklahoma Statutes, 1921, Chap. 3, Article XIV), could not be entertained in the Federal Court, since there was an adequate remedy at law, the plaintiffs being out of possession and defendant being in possession of the land in question. Whitehead vs. Shattuck, 138 U. S. 146; McGuire vs. Pensacola Co., 105 Fed. 677; Gordan vs. Jackson, 72 Fed. 86; Wehrman vs. Conklin, 155 U. S. 314, 325; Dowell vs. Mitchell, 105 U. S. 430; Frost vs. Spitley, 121 U. S. 552, 556; Lawson vs. United States Mining Co., 207 U. S. 1, 9; Bigelow vs. Chatterton, 51 Fed. 614; Scott vs. Bank, 285 Fed. 832 (this court).

The exact question was decided in the case last cited, where this court, speaking by Judge Sanborn, said:

101 "But, where the defendant is in possession and the plaintiff is out of possession, the latter can test the title and right to the possession and to the profits or damages by an action at law, the defendants, under the Seventh Amendment to the Constitution of the United States, which provides that 'in suits at common law, where the value of the controversy shall exceed $20, the right of trial by jury shall be preserved,' and under section 1244, Comp. Stat. 1918, section 267, Judicial Code, Rev. Stat. Sec. 723, which provided that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law,' is entitled to a trial of its claimed title and right to the possession by a jury in an action at law. As this right to the trial of its title and right of possession rest upon the Constitution and statutes of the United States, the legislation of the state of Oklahoma cannot deprive the defendant of its right in the federal courts, and the rule and practice that a plaintiff out of possession cannot maintain in the federal courts a suit in equity against a defendant in possession of real estate to quiet the title or right of possession thereto has become established and settled beyond controversy."

No attempt was made in the instant cases to redraft the pleadings. The cases were docketed on the equity side of the Court; were tried to the Court without a jury; "decrees" were entered, and appeals have brought the cases to this court.

Though the practice which was followed in the District Court was irregular, the judgments were not void. Hatcher vs. Hendrie Co., 133 Fed. 267; Ewert vs. Robinson, 289 Fed. 749, 755. The allegations of the complaint were sufficient to constitute a cause of action at law, to wit: ejectment. It was competent for the parties to try the action to the Court without a formal waiver in writing of a jury. The relief afforded was such as could be given in an action at law, except the dismissal of the plaintiff's petition in three of the cases for want of equity. This, however, may be disregarded as surplusage—in view of the other relief granted.

The fact that the judgments are called "decrees" is not of vital importance.

102 Finally, the fact that the defeated parties have resorted to appeals instead of writs of error, is of no significance in view of the Act of September 6, 1916, Chap. 448, Sec. 4 (39 Stat. 727), which reads:

"That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

We conclude therefore that this court must take the action which would be appropriate if the proper appellate procedure had been followed; that is, if writs of error had been sued out from judgments entered in law actions tried to the Court without a jury but nor formal waiver in writing having been filed.

Considering these cases in that manner, viz.: as civil cases at law tried to the Court without a waiver of jury as provided by law, it is clear that this court has no jurisdiction to review any question except those which arise on the process, pleadings, or judgments.

The assignments of error disclose that claim is made that the Court erred (1) in admitting evidence; (2) in excluding evidence; (3) in refusing to enter judgments for plaintiffs; (4) in making findings not supported by the evidence; (5) in refusing to make other findings.

None of these assignments can be considered by this court in view of the form of trial had in the court below. Flanders vs. Tweed, 9 Wall. 425, 429; Kerney vs. Case, 12 Wall. 275; County of Madison vs. Warren, 106 U. S. 622; Bond vs. Dustin, 112 U. S. 604, 606, 607; Dundee Co. vs. Hughes, 124 U. S. 157, 160 Andes vs. Slauson, 130 U. S. 435, 438; Spalding vs. Manasse, 131 U. S. 65, 66; Campbell vs. United States, 224 U. S. 99, 105; Rush vs. Newman, 58 Fed. 158, 160; Ladd & Tilton Bank vs. Lewis A. Hicks Co., 218 Fed. 310; Wm. Edwards C. vs. LaDow, 230 Fed. 378, 383; Bowers vs. Henry Steers, Inc., 241 Fed. 377, 378; Ford vs. United States, 260 Fed. 657 (this court); Ford vs. Grimmett, 278 Fed. 140, 142; St.
103 Louis, etc., Ry. Co. vs. Commissioners, 265 Fed. 524, 528 (this court); City of Cleveland vs. Walsh Co., 279 Fed. 57, 61, 63; United States vs. National City Bank, 281

Fed. 754, 758; National City Bank vs. Kimball Bank, 2 F. (2d) 461, and cases cited.

It is true that the effect of the trial procedure was not raised in the trial court, nor has it been argued here, but it is the duty of this court to take note of it. Bond vs. Dustin, supra; Ladd & Tilton Bank vs. Lewis A. Hicks Co., supra; St. Louis, etc. Ry. Co. vs. Commissioners, supra.

The claim of plaintiffs that the extension agreement was procured by fraud, and the claim that the statutory procedure was not followed in obtaining the extension, would both require for their determination an examination and consideration of the evidence; but for the reasons above stated, such examination and consideration cannot be had in this court.

What has been said relative to the scope of the review in this court on the appeals by the plaintiffs, applies equally to the review sought by defendant in its cross appeal as against Kuroki Twist and Willie V. Twist.

The pleadings being sufficient to support the judgments in the several cases, the judgments are affirmed.

Filed May 9, 1925.

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104 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1925.
Saturday, May 9, 1925.

Edward C. Twist, Albert T. Twist and Jessie L. Payne, nee Twist, Appellants,

6499. vs.

Prairie Oil and Gas Company, a corporation.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

and

The Prairie Oil and Gas Company, Appellant,

No. 6508. vs.

Kuroki Twist and Willie V. Twist.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and were argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in these causes be, and the same is hereby, affirmed without costs to either party in this Court.

May 9, 1925.

120 (Order denying Petition for Rehearing.)

September Term, 1925,
Wednesday, December 2, 1925.

These causes came on this day to be heard upon the petition for a rehearing, filed by Counsel for Edward C. Twist and others.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

December 2, 1925.

(Motion for Stay of Mandates.)

In the United States Circuit Court of Appeals For the Eighth Circuit.

Edward C. Twist, et al., Appellants,
No. 6499. vs.
The Prairie Oil & Gas Company, Appellee.

Edward C. Twist, Appellant,
No. 6500 vs.
The Prairie Oil & Gas Company, Appellee.

Come now the appellants in the above entitled and numbered causes, by their counsel of record, and certify that it is their desire and intention promptly to file in the Supreme Court of the United States petition for writ of cer-
121 tiorari, together with copies of the full record in these causes, as provided by the Statutes covering such cases. Appellants therefore respectfully pray that the issuance of mandate in these causes be stayed until further order of this Court, pending the filing of the petition for writ of certiorari.

In this connection counsel for appellants certify that said petition will be filed in good faith and not for the purpose of delay.

JAMES S. WATSON,
D. H. LINEBAUGH,
PAUL PINSON,
Attorneys for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 15, 1925.

(Order staying issuance of Mandates.)

December Term, 1925,
Tuesday, December 15, 1925.

On Consideration of the motion of appellants for a stay of the issuance of the mandates of this Court pending the filing of a petition for writ of certiorari in the Supreme Court of the United States, It is ordered by this Court that the issuance of the mandates in these causes, be, and the same is hereby, stayed for a period of forty days from and after this date, unless the petition for a writ of certiorari shall have been sooner dispossed of by said Supreme Court.

December 15, 1925.

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122 (Motion for Further Stay of Mandates.)

Come now the appellants in the above entitled and numbered causes, by their counsel of record, and certify that it is their desire and intention promptly to file in the Supreme Court of the United States petition for writ of certiorari, together with copies of the full record in these causes, which records have been ordered and are now being prepared by the Clerk of this Court for filing in the Supreme Court of the United States.

That heretofore, and on December 16, 1925, this Court entered its order staying the mandate for forty days, and your petitioners respectfully request an order further staying the mandate for on additional twenty days, to afford time within which to file in the Supreme Court of the United States the record as now being prepared by the Clerk of this Court.

Counsel for appellants certify that said petition for writ of certiorari will be filed in the Supreme Court of the United States in good faith and not for the purpose of delay.

Wherefore, appellants pray an order of this Court staying the mandate in these causes for an additional twenty days, or until February 16, 1926.

D. H. LINEBAUGH,
PAUL PINSON,
JAS. S. WATSON,
Attorneys for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 26, 1926.

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123 (Order further Staying Issuance of Mandates.)

December Term, 1925,
Tuesday, January 26, 1926.

On Consideration of the motion of appellants for a further stay of the mandates of this Court for a period of twenty days, or until February 16, 1926, pending the filing of a petition for writ of certiorari in the Supreme Court of the United States, It is ordered by this Court that the issuance of the mandates in these causes, be, and the same is hereby, stayed until February 16, 1926, unless the petition for a writ of certiorari shall have been sooner disposed of by said Supreme Court.

January 26, 1926.

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124 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, in certain causes in said Circuit Court of Appeals wherein Edward C. Twist, et al., were Appellants, and the Prairie Oil and Gas Company, a Corporation, was Appellee, No. 6499, and wherein The Prairie Oil and Gas Company was Appellant and Kuroki Twist, et al., were Appellees, No. 6508, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in cause No. 6499, Edward C. Twist, et al., Appellants, vs. Prairie Oil and Gas Company, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of February, A. D. 1926.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fols. 105-119] Petition for rehearing, covering 15 pages, filed July 6, 1925, omitted from this print. It was denied and nothing more by order, December 2, 1925.

[fol. 125] In Supreme Court of the United States

Order Allowing Certiorari—Filed March 22, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[redacted]301

In the Supreme Court of the United States

October Term, 1938.

EDWARD C. TWIST, Petitioner,

vs.

PRAIRIE OIL & GAS COMPANY, Respondent.

Petition for Review on Writ of Certiorari, and Brief in Support Thereof.

JAMES L. WATSON,
D. HADEN LIBERMANN,
PAUL PINSON,
Attorneys for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. . . . . .

EDWARD C. TWIST, *Petitioner,*

vs.

PRAIRIE OIL & GAS COMPANY, *Respondent.*

PETITION FOR REVIEW ON WRIT OF *CERTIORARI.*

To the Honorable,

The Supreme Court of the United States:

Edward C. Twist, petitioner, respectfully shows to this honorable court that on August 3, 1922, he filed in the District Court for Tulsa County, Oklahoma, his petition against the Prairie Oil & Gas Company, which, by proper proceedings, was removed to the United States Court for the Eastern District of Oklahoma, on September 15, 1922, and there docketed *by respondent* as No. 2930 *Equity*.

In the first cause of action it was alleged:

"(1) The petitioner was a Cherokee Indian. Certain land in Tulsa County, Oklahoma, allotted to him, was during his

minority leased by his guardian for oil and gas mining purposes to the Los Angeles-Cherokee Oil & Gas Company. This lease remained in force until March 21, 1920, when it expired by its terms.

(2) On June 5, 1916, while that lease was in force, and while oil was being produced in paying quantities, the lessee instituted proceedings in the County Court of Tulsa County, seeking and obtaining an extension of the terms of said lease for as long as oil and gas was produced in paying quantities from the leased premises. Thereafter the original and the "new" or "extension" lease were assigned to the respondent.

(3) That the proceedings in the Tulsa County Court, whereby said "new" or "extended" lease was obtained were void, because: *(a)* no opportunity was given for bids by others than the lessee; *(b)* the property was not sold at public auction; *(c)* the property was sold in bulk, together with property of other minors; *(d)* the proceedings were in violation of Rule Nine of the Supreme Court of Oklahoma, which provides that such lease shall be sold only in open court to the highest and best responsible bidder, and that notice of such sale must be given by posters, and by publication, where publication is practicable; *(e)* the lease was obtained by fraud, duress and false dealing, and for a grossly inadequate consideration.

(4) That the defendant thereafter entered upon the premises and withdrew oil and gas continuously.

The prayer was for damages for defendant's trespass since the expiration of the original lease.

The second cause of action sought cancellation of the "new" or "extended" lease as a title cloud, injunction against the trespass, and the quieting of plaintiff's title.

The joinder of these causes of action was appropriate under the Oklahoma Code.

Respondent answered, denying contravention of Rule 9, traversing the allegations of fraud, alleging a bona fide purchase for value, and admitting the substance of the petition otherwise.

The prayer of the answer was: *(1)* That the plaintiff's petition be dismissed for *want of equity; (2)* that the *title of respondent be declared valid and quieted.*

Petitioner filed reply, putting the whole case squarely in equity (R. 32), denying respondent's good faith and the jurisdiction of the County Court to enter the order approving the "new" or "extended" lease.

On April 27, 1923, the court entered a decree (omitting formal parts) as follows:

> "And the court being now fully advised in the premises, finds all the issues, and concludes in favor of the defendant.
>
> "It is, therefore, ordered, adjudged and decreed as follows, *viz:*
>
> "That the plaintiff's petition be, and it is hereby, *dismissed for want of equity*, at his costs.
>
> "It is further ordered, adjudged and decreed that the defendant is the owner of, and has a good and valid title to, an oil and gas mining lease on the * * * (description of land) * * * for a period extending so long as oil or gas is produced from said land, the *defendant's title to which is hereby quieted and confirmed* as against the claims of the plaintiff."

In the trial court the facts pertaining to the profits derived from the leases, for accounting, and the formal proceedings to secure the "new" or "extended" lease, were submitted by stipulation (R. 35). Upon the allegations of fraud, false dealing and inadequacy of consideration, testimony was offered.

On June 23, 1923, an appeal was allowed, and thereafter filed in the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis. The cause was entered and docketed in said court as No. 6500, and consolidated for presentation with certain other cases, in one of which (No. 6499) petition for writ of *certiorari* is also submitted. The complete record referred to is No. 6499.

On the 9th day of May, 1925, the Circuit Court of Appeals rendered its decision, holding that the action in the trial court was at law; and, because it was tried to the court without written waiver of a jury, refusing to consider the errors assigned, which were as follows:

(1) Admitting evidence;

(2) Excluding evidence;

(3) Refusing to enter judgment for plaintiff;

(4) Making findings not supported by the evidence;

(5) Refusing to make other findings.

The decree of the trial court was affirmed. Thereafter, petitioner filed his petition for rehearing, which was denied on the 2nd day of December, 1925.

A transcript of the record in the case, including the proceedings in the Eighth Circuit Court of Appeals, accompanies this petition.

Your petitioner is advised and believes that the judgment of the Circuit Court of Appeals, though made final in said cause by the Judicial Code, is, nevertheless, erroneous, and that this honorable court should require the case to be certified to it for review and determination, in conformity with the provisions of the Judicial Code, for the following reasons:

(1) The decision is in conflict with a rule of law announced by the Ninth Circuit Court of Appeals, and the Sixth Circuit Court of Appeals.

(2) The decision involves an important question of federal law which has not been, but should be, settled by this court.

(3) The decision is in conflict with decisions of the Supreme Court of Oklahoma, and involves property rights of value within that state.

All of which matters are more fully set forth in a brief appended to this petition.

Wherefore, your petitioner respectfully prays that writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the cause entitled, *Edward C. Twist, Appellant*, v. *Prairie Oil & Gas Company, Appellee*, No. 6500, to the end that the said case may be reviewed and determined by this court as provided by the Judicial Code; or that your petitioner may have such other and further relief in the premises as this

court may deem appropriate and in conformity with the provisions of law; and that the judgment of the said Circuit Court of Appeals, affirming the judgment of the trial court, and every part thereof, may be reversed by this honorable court and an appropriate judgment rendered therein.

Edward C. Twist

EDWARD C. TWIST, *Petitioner,*

James S. Watson

By JAMES S. WATSON,

D. Hayes Linebaugh

D. HAYES LINEBAUGH,

Paul Pinson

PAUL PINSON,

Attorneys for Petitioner.

State of Oklahoma,
County of Muskogee.

Paul Pinson, being first duly sworn, upon oath states that he is one of counsel for the petitioner herein and is acquainted with all of the proceedings had in the above entitled and numbered cause and is familiar with the contents of the foregoing petition, and the facts stated in said petition are true to the best of his knowledge and belief.

Paul Pinson

PAUL PINSON.

Subscribed and sworn to before me this the 26th day of January, 1926. E. K. Folsom, Notary Public. (Seal) My commission expires September 15, 1927.

E. K. Folsom

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

The opinion establishes a rule of law in conflict with the rule of law announced by the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals.

Petitioner, the undisputed owner of land, sued for damages for continuing trespass, for cancellation of recorded conveyances as clouds upon his title, injunction and quieting of title (R. 1). In its answer respondent sought a decree dismissing plaintiff's petition for want of equity and quieting its title (R. 28). Respondent docketed the case as in equity and at the trial stated "this now is a suit in equity" (R. 37). The facts upon which an accounting (obviously necessary) could be had, and all other facts pertaining to the decision, except on the question of fraud and inadequacy of consideration, were stipulated (R. 35). The parties treated the case as in equity. The trial court so treated it. The decree granted equitable relief only (R. 33).

The Court of Appeals, affirming the decree, say:

> "The assignments of error disclose that claim is made that the court erred *(1)* in admitting evidence; *(2)* in excluding evidence; *(3)* in refusing to enter judgments for plaintiffs; *(4)* in making findings not supported by the evidence; *(5)* in refusing to make other findings.
>
> "None of these assignments can be considered by this court in view of the form of trial had in the court below. * * *
>
> "It is true that the effect of the trial procedure was not raised in the trial court, nor has it been ar-

gued here, but it is the duty of this court to take note of it.

* * * * * * *

"The pleadings being sufficient to support the judgments in the several cases, the judgments are affirmed."

We contend that this was a suit in equity. If so, the Circuit Court is in error by its own opinion.

Equity has jurisdiction to cancel deeds, leases and contracts, to enjoin against continuing trespass and waste, and to quiet title. These are established equitable remedies.

—*Kellogg* v. *Schaeble*, 273 Fed. 1012;
Fay v. *Hill*, 249 Fed. 418 (8th Cir. Appls.);
Black, Rescission and Cancellation, Vol. 2, Sec. 655;
General Film Co. v. *Sampliner*, 252 Fed. 444;
Sayers v. *Burkhardt*, 85 Fed. 246;
Chanslor Canfield Co. v. *U. S.*, 266 Fed. 145;
Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co.*, 260 Fed. 724;
Becker Franz Co. v. *Shannon Co.*, 256 Fed. 522;
Bispham's Prin. of Eq. (8th ed.), Sec. 31;
Story, Equity Jr., (14th ed.) Vol. 2, Secs. 932-933;
9th Corpus Juris, p. 1160.

The remedy at law was in the plaintiff, for possession and to recover damages, but it was "not adequate, by no means as practical and efficient as a remedy in equity."

—*Chanslor Canfield Co.* v. *U. S.*, *supra* (9th Circuit Court of Appeals).

If a court of equity has jurisdiction, it may also dispose of the legal title.

—*Chanslor Canfield Co.* v. *U. S.*, *supra*;

Becker Franz Co. v. *Shannon Co., supra* (9th Circuit Court of Appeals);
Equity Rule 23.

Even if the remedy at law be deemed adequate, equity may proceed in the absence of objection. It is not a question of jurisdiction, but of procedure, which may be waived.

—Enc. U. S. Supreme Ct. Rep., Vol. 5, p. 826;
Perego v. *Dodge*, 163 U. S. 161, 41 L. ed. 113;
Ashland Waterworks Co. v. *City of Ashland*, 215 Fed. 492;
National Leather Co. v. *Roberts*, 221 Fed. 922;
Audit Co. v. *City of Louisville*, 185 Fed. 349;
Hapgood v. *Berry*, 157 Fed. 807;
Green v. *Turner*, 98 Fed. 256;
Becker Franz Co. v. *Shannon Co., supra;*
Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co., supra;*
Pacific Coal & Transportation Co. v. *Pioneer Mining Co.*, 205 Fed. 577, 9th C. C. A.;
Fay v. *Hill*, 249 Fed. 415, 8 C. C. A.;
Hansell v. *Purnell*, 1 Fed. (2nd) 266.

And the fact that an action for damages for trespass was included in the plaintiff's bill, does not oust equity of jurisdiction.

—*Becker Franz Co.* v. *Shannon Co., supra;*
Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co., supra;*
Chanslor Canfield Co. v. *U. S., supra.*

For the court's convenience we quote pertinent passages from the opinions cited.

Becker Franz Company v. *Shannon Copper Co.*, (Ninth Circuit Court of Appeals):

"We think the rule to be followed in the Federal Courts is that where, as in the present case, no objection is raised in the trial court to the disposition of the question of the legal title by a court of equity, the objection is waived so far as the appellate court is concerned. (*Elder* v. *McClaskey*, 70 Fed. 529, 17 C. C. A. 251; *Certiorari Denied*, 163 U. S. 685; *Reques* v. *Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. ed. 934.)"

Chanslor Canfield Co. v. *U. S.*, (9th Circuit Court of Appeals):

Here the court, considering Equity Rules 22 and 23, and section 274a of the Judicial Code, dealt with a situation substantially similar to the case at bar. The United States, undisputed owner of land, brought suit to enjoin a continuing trespass by the company which was removing oil therefrom. The company moved to transfer the case to the law side of the court. The defendant's answer alleged that the United States was not in possession, and that the action was in ejectment.

HUNT, Circuit Judge, in the opinion (p. 147) said:

"Remedy at law for possession and to recover damages for the trespass is in plaintiff, but such remedy is not adequate, by no means as practical and efficient as a remedy in equity. (*Magruder* v. *Belle Fourche, etc., Association*, 219 Fed. 72, 135 C. C. A. 524. In *Johnston* v. *Carson G. M. Co.*, 157 Fed. 145, 84 C. C. A. 593, 15 L. R. A. (N. S.) 1078, there was a serious controversy as to title, hence the case is distinguished from the instant one.

"There is no controversy as to where the legal title to the property here involved rests, and if the defendants have no right to the oil in the lands or to the

possession thereof as against the United States, then certainly remedy at law is inadequate to prevent injury of an irreparable character being done to the land, even to the destruction of the value thereof."

Though timely motion was made to transfer, equity rightfully retained jurisdiction. The decree of the District Court for injunction, for damages for trespass, and that all improvements be turned over to the United States (in effect, ejectment), was affirmed.

Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co.* (9th Circuit Court of Appeals):

"The original complaint in which the Twenty-one Mining Company was named as sole defendant contains all the essential averments of a bill to quiet title to said vein. * * * It is true that plaintiff has commenced an action at law against the defendant, but such action was not, as alleged, to recover possession of the property in dispute, but solely to recover damages for trespass thereon."

This is exactly the status of the case at bar. The only judgment sought in the plaintiff's first cause of action was a judgment for damages for the trespass.

(p. 727) "The defendants were seeking affirmative relief and the cause was submitted by all parties, not as one already determined by verdict or judgment in the action at law, or as depending upon the result of that action, but as *res integra*, upon which the independent judgment of the court was sought and which was to be decided, not upon the evidence adduced in the law case alone, but upon other additional and independent testimony as well. * * *

"It is not a case here of conferring jurisdiction on the court in a matter not of equitable cognizance. The court, as a court of equity, had and has jurisdiction

to quiet title; the bill contains all the allegations necessary for that purpose, all the parties were properly before the court, and all acquiesced in the method of procedure. In such case neither party will be permitted, by the temporary withholding of objections until after the court has announced its decision, to place himself in such advantageous position that, winning, he can accept the fruits of victory, or, losing, escape the burdens of defeat. The decree appealed from therefore cannot be disturbed for lack of jurisdiction."

Hansell v. *Purnell* (6th Circuit Court of Appeals):

"Defendants, who by a cross bill invoke the equity jurisdiction of the court in relation to the same transactions to which the complainant's bill relates and pray for equitable relief, are estopped to deny equity jurisdiction."

Pacific Coal & Transportation Co. v. *Pioneer M. Co.* (9th C. C. A.):

"Now, the allegations of plaintiff's complaint show the action to be equitable. The defendants' denial of possession on the part of the plaintiff cannot oust the court of equity of jurisdiction. If the denial was substantiated at the trial, the issues there remaining, it would defeat the action, because plaintiff would not then have maintained its cause. But another feature is injected into the controversy here, which is controlling. The defendants have not only joined issue with the plaintiff touching the equitable cause as pleaded, but they have set up a like cause, and pray equitable relief, and at the same time they have interposed one or more equitable defenses. By so doing they have waived their objection to the equitable jurisdiction and cannot now be heard to insist upon the legal remedy. *Levi* v. *Evans*, 57 Fed. 677, 6 C. C. A. 580; *Hook* v. *Justice Min. Co.*, (C. C.) 58 Fed. 827 * * *" (and other cases).

In *Fay* v. *Hill* (8th C. C. A.) it is held that failure to move to transfer a bill to the law side on the ground that there is a complete and adequate remedy at law, and proceeding to a hearing, is a waiver of the objection. (Syllabus, paragraph 2.) Also, that where an equitable defense is interposed in an action at law, it will have to be disposed of by the court sitting as a chancellor before the trial of the action at law to the jury. And also, a court of equity, having obtained jurisdiction of a suit wherein cancellation of contract for sale was sought, will retain the jurisdiction to dispose of *all controversies between the parties* arising out of the transaction.

Respondent has waived the right to object and is estopped by its actions to raise the question that the plaintiff's action was at law. This is the clear pronouncement of the cases cited.

Can the appellate court disregard the waiver, revoke the estoppel, and refuse to determine the question presented, for the reasons assigned?

II.

The decision involves an important question of federal law which has not been, but should be, settled by this court.

The question is substantially as stated in the closing paragraph of the last proposition. No definite pronouncement of this court is found, unless it be in *Liberty Oil Co.* v. *Condon Bank*, hereafter referred to.

Stated otherwise, the question is the application of sections 274a and 274b, and Equity Rule 22, to the facts at bar. We respectfully urge that this court should deter-

mine whether the transfer of causes contemplated can be accomplished by the appellate courts.

Section 274a is in these words:

"In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form." (38 Stat. at L. 956.)

Section 274b:

"In all actions at law, equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same right in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree shall be regulated by rule of court. Whether such review be sought by writ of error or appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

Equity Rule 22:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the

> law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

By the petition, answer and reply, in our case the jurisdiction of equity was invoked. By the decree, equitable remedies alone were supplied. If this was not an equity case, nevertheless the defendant has waived the right to raise the question. Now, if it can be raised by the appellate court for the first time, *sua sponte*, Equity Rule 22 and section 274a are mere pitfalls to entrap the unwary litigant. The spirit of this section and rule is emphatically non-technical, yet it would be better to repeal them if they contemplate a transfer by the appellate court. Substantially, that is what the Circuit Court of Appeals accomplished here—a transfer from equity to law.

From *Indian Land & Trust Co.* v. *Shoenfeldt*, 135 Fed. 484, we quote:

> "Prior to this enactment [Rule 22] a suit erroneously commenced on the equity side must be dismissed on motion of defendant or by the court. * * *
>
> "When a court of equity had no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised."

Under the rule, however, if the opinion of the Eighth Circuit Court is correct, when a case is erroneously docketed and tried in equity, no opportunity is afforded to refile when the error is discovered. The appellate court determines the one question, that the litigant s e l e c t e d the

wrong branch of the court, and the case is at an end. This is one error of the trial court which can operate to the disadvantage of the losing party only, and for which the decision is not reversed, but affirmed.

However, if "a suit in equity should have been brought at law" under section 274a, "any party should have the right, *at any stage of the proceedings*, to amend his pleadings" to obviate that objection. If this right had been granted us, the only amendment essential was that established by the trial court's decree—the dismissal of the bill. Then both parties would have been before the court on the prayers to quiet title. One or the other was in possession, therefore equity was the proper remedy. No such opportunity could be afforded us in the appellate court, because "the cause shall proceed and be determined upon such amended pleadings." Clearly the transfer must be made in the District Court, and if not so made, the consequent questions of procedure are waived.

It is important that this court determine the question whether this rule and these sections shall be construed to simplify or to complicate federal practice.

Liberty Oil Company v. *Condon National Bank*, 260 U. S. 235, 67 L. ed. 232, is persuasive that the present decision of the Circuit Court of Appeals is erroneous. The Eighth Circuit Court of Appeals held (271 Fed. 928) that the action was a suit at law, and that, as the bill of exceptions showed no special findings of fact in a cause in which a jury had been waived, but only a general finding for the interveners, the court would not consider the sufficiency of the evidence to sustain the finding. The action was docketed as at law, for money had and received. The defendant

bank, claiming to be a mere stakeholder, asked that other persons be brought in as defendants, and their rights adjudicated. The opinion by Mr. Chief Justice TAFT states that "its answer and cross petition became an equitable defense and a prayer for affirmative equitable relief in the nature of a bill for interpleader."

After citing section 274b of the Judicial Code, the opinion proceeds:

> "This section applies to the case before us. The proceeding was changed by defendant's answer and cross petition from one at law to one in equity, *with all the consequences flowing therefrom.*"

The court suggests that a better practice would have been to transfer the cause to the equity docket as provided conversely in Rule 22. But the failure to transfer did not change the equitable character of the case which "it had taken on by the answer and cross petition of the defendant. The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction between proceedings in law and equity is abolished, and remedies at law and in equity are available to parties in the same court and the same cause." *In other words, the suit was an equitable action because the answer of the defendant made it so.*

The opinion then points out that while these sections (274a and 274b) of the Judicial Code "did not create one form of civil action as do the codes of procedure in the states," yet they

> "manifest a purpose on the part of Congress to change from a suit at law to one in equity, and the reverse,

with as little delay and as little insistence on form as possible, and are long steps toward code practice.

"Coming now to apply those two sections thus construed to the case before us, we find that by defendant's answer and the court's order it became a bill of interpleader in equity. Thereafter the proceedings should have been so treated, both in the trial and appellate courts. The chancellor, having sustained a bill of interpleader, disposed of the controversy between the claimants by directing any method of trial which would best and expeditiously accomplish justice in the particular case (citing cases). This well established rule takes the issues here to be tried out of that class of issues in which there must have been a jury trial under the Seventh Amendment. Where it was one which the chancellor could readily dispose of in one proceeding, it was in the interest of economy, expediency and justice that he should have done so. This is in accord with the general rule in equity embodied in Equity Rule 23, that jurisdiction once assumed should be maintained to the end of the litigation (citing cases)."

This is in accord with the decisions in:

Hansell v. *Purnell*, 1 Fed. (2nd) 266, 8th C. C. A.;

Pacific Coal & Transportation Co. v. *Pioneer Mining Co.*, 205 Fed. 577, 9th C. C. A.;

Vidal v. *Co.*, 276 Fed. 856-7, 2nd C. C. A., syllabus, par. 13;

Fay v. *Hill* 249 Fed. 415, 8th C. C. A.

We also call attention to the agreed statement of fact in the instant case, which presented for the appellate court a question of law, and not of fact.

—*Ford* v. *Grimmett*, 278 Fed. 140.

III.

The decision is in conflict with the decisions of the Supreme Court of Oklahoma, and involves property rights of value within the jurisdiction of that court.

The petitioner, a Cherokee Indian allottee, was a ward of the United States and restricted during his minority.

—*Truskett* v. *Closser*, 236 U. S. 223.

The power to lease, on the date specified, was conferred by section 6 of the Act of May 27, 1908 (35 Stat. at L. 312), on the probate courts of the state. These courts become federal instrumentalities for the removal of this restriction, but the procedure for leasing was to be prescribed by the state alone. The right to regulate procedure includes the power to enforce compliance, and implies jurisdiction to determine the effect of non-compliance.

Section 2, article 7, of the Oklahoma Constitution, is in part as follows:

> "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law."

By request of the Interior Department of the United States (see report, Commissioner Indian Affairs, 1914, pp. 50-55) the Supreme Court of Oklahoma promulgated certain rules for the control of the probate courts, Rule 9 being in these words:

> "No oil and gas or other mineral lease covering lands belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed at least five

days before the same are sold, as provided herein, and notice of such sale must be given by posting and by publication, where publication is practicable, and shall be on ..... of each ....."

In October, 1915, the rules were construed by the Supreme Court of Oklahoma. They were said to be local statutes, of the same effect as if enacted by the legislature. It was held that the probate courts had no power or authority, that is to say, no jurisdiction, to ignore or dispense with these rules.

—*Freeling* v. *Kight*, 49 Okl. 202, 152 Pac. 362.

The extension leases here involved were taken in 1916 (R. 23). The local law at that time as announced in *Freeling* v. *Kight*, was in force, and known to respondent. Yet Rule 9 was deliberately violated in that *(1)* no public sale was had to the highest and best bidder; and *(2)* the so-called notice of sale, instead of giving the unqualified announcement that a sale would be conducted on a given date, announced that a hearing would then be held to determine the question of the propriety of such a sale.

At the time the "notice of sale" was posted, no order of sale had been made. No notice could be given till the authority had been granted. The casually interested investor must have been misled by the notice and competition thus prevented. The reason is obvious. The properties (in all the cases) were purchased for $18,000.00; they were sold shortly after for $250,000.00. All arrangements for the sale, even to the smallest detail, were made prior to the filing of the petition. The record does not disclose a public sale, but a mere confirmation by the court of the former private agreement.

Such sales are held absolutely void as against the public policy of the State of Oklahoma, in

Winona Oil Co. v. *Barnes*, 83 Okl. 248, 200 Pac. 981;
Carlile v. *National Oil & Development Co.*, 83 Okl. 217, 201 Pac. 377.

It is held that the probate courts have no jurisdiction to order or confirm a transaction of this character.

The federal courts are bound by the local construction of state laws, especially when the interpretation antedates the transaction involved, and this is particularly true where the jurisdiction of inferior state tribunals is the subject in question.

Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349;
St. L. & S. F. Railroad Co. v. *Quinette*, 251 Fed. 773;
Messenger v. *Anderson*, 225 U. S. 436;
Barnett v. *Kunkel*, 259 Fed. 394;
Commercial Bank v. *Buckingham*, 5 How. 317, 12 L. ed. 169;
Balkham v. *Woodstock Iron Co.*, 154 U. S. 177;
Leffingwell v. *Warren*, 67 U. S. 599;
Standard Oil Co. v. *Missouri*, 224 U. S. 270;
Freeport Water Co. v. *Freeport*, 180 U. S. 587.

In a sense Rule 9 is a federal restriction upon the alienation of Indian land. The sovereign guardian of the petitioner procured its enactment by the state court. It was designed to prevent the existence of the situation here presented. It should therefore be so construed as to destroy the evil at which it was aimed. It is of no value unless its violation shall invoke a penalty. The penalty prescribed is

not confiscatory, since the decisions require reimbursement for the expense of development.

—*Barnes* v. *Winona Oil Co.*, 83 Okl. 253, 200 Pac. 985.

Conveyances violating federal restrictions generally are held void, and this should furnish an additional reason for following the local decisions here.

—Act May 27, 1908, Sec. 5;
Truskett v. *Closser, supra;*
Heckman v. *U. S.*, 224 U. S. 413;
Goat v. *U. S.*, 224 U. S. 458.

As shown by the record, the amount involved is such that it is probable either party will seek a final decision by this court. If the cause shall be remanded to the Circuit Court with instructions to determine the merits, the litigation will be unduly prolonged. Therefore, we urge in the interest of expediency that the matter be heard and determined on its merits by this court in the present state of the record.

—*Liberty Oil Co.* v. *Condon National Bank, supra.*

Respectfully submitted,

James S. Watson,
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Paul Pinson,
Attorneys for Petitioner.

Office Supreme Court, U. S.
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WM. R. STANSBURY
Clerk

No. 302

In the Supreme Court of the United States

October Term, 1907.

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *nee* TWIST, *Petitioners*,

vs.

PRAIRIE OIL & GAS COMPANY, *Respondent*.

Petition for Review on Writ of *Certiorari*, and Brief in Support Thereof.

JAMES S. WATSON,
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PAUL PERSON,
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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. .....

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *NEE* TWIST, *Petitioners,*

vs.

PRAIRIE OIL & GAS COMPANY, *Respondent.*

PETITION FOR REVIEW ON WRIT OF *CERTIORARI.*

To the Honorable,

The Supreme Court of the United States:

Edward C. Twist, Albert T. Twist and Jessie L. Payne, nee Twist, petitioners, respectfully show to this honorable court that on August 3, 1922, they filed in the District Court for Tulsa County, Oklahoma, their petition against the Prairie Oil & Gas Company, which, by proper proceedings, was removed to the United States Court for the Eastern District of Oklahoma, on September 15, 1922, and there docketed *by respondent* as No. 2929 *Equity*.

In the first cause of action it was alleged:

(1) The petitioners are Cherokee Indians. Certain land in Tulsa County, Oklahoma, allotted to William G. Twist, of whom petitioners are heirs, was during their minority leased by their guardian for oil and gas mining purposes to the Los Angeles-Cherokee Oil & Gas Company. This lease remained in force until September 29, 1919, when it expired by its terms.

(2) On June 5, 1916, while that lease was in force, and while oil was being produced in paying quantities, the lessee instituted proceedings in the County Court of Tulsa County, seeking and obtaining an extension of the terms of said lease for as long as oil and gas was produced in paying quantities from the leased premises. Thereafter the original and the "new" or "extension" lease were assigned to the respondent.

(3) That the proceedings in the Tulsa County Court, whereby said "new" or "extended" lease was obtained were void, because: *(a)* no opportunity was given for bids by others than the lessee; *(b)* the property was not sold at public auction; *(c)* the property was sold in bulk, together with property of other minors; *(d)* the proceedings were in violation of Rule Nine of the Supreme Court of Oklahoma, which provides that such lease shall be sold only in open court to the highest and best responsible bidder, and that notice of such sale must be given by posters, and by publication, where publication is practicable; *(e)* the lease was obtained by fraud, duress and false dealing, and for a grossly inadequate consideration.

(4) That the defendant thereafter entered upon the premises and withdrew oil and gas continuously.

The prayer was for damages for defendant's trespass since the expiration of the original lease.

The second cause of action sought cancellation of the "new" or "extended" lease as a title cloud, injunction against the trespass, and the quieting of plaintiffs' title.

The joinder of these causes of action was appropriate under the Oklahoma Code.

Respondent answered, denying contravention of Rule 9, traversing the allegations of fraud, alleging a bona fide purchase for value, and admitting the substance of the petition otherwise.

The prayer of the answer was: *(1)* That the plaintiffs' petition be dismissed for *want of equity; (2)* that the *title of respondent be declared valid and quieted.*

Petitioners filed reply, putting the whole case squarely in equity (R. 32), denying respondent's good faith and the jurisdiction of the County Court to enter the order approving the "new" or "extended" lease.

On April 27, 1923, the court entered a decree, the pertinent portions of which are as follows:

> "• • • And the court now being fully advised in the premises, finds the issues, and concludes, in favor of the defendant as to all the plaintiffs except Kuroki Twist and Willie V. Twist.
>
> It is therefore ordered, adjudged and decreed that defendant is the owner of an oil and gas mining lease covering an undivided eleven-fifteenths (11/15) interest in the following lands, to-wit (description) • • • extending for a period so long as oil or gas is produced

from said lands, and that its title thereto is hereby quieted and confirmed against the claims of the plaintiffs, to all of which the plaintiffs except," etc.

In the trial court the facts pertaining to the profits derived from the leases, for accounting, and the formal proceedings to secure the "new" or "extended" lease, were submitted by stipulation (R. 35). Upon the allegations of fraud, false dealing and inadequacy of consideration, testimony was offered.

On June 23, 1923, an appeal was allowed, and thereafter filed in the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis. The cause was entered and docketed in said court as No. 6489, and consolidated for presentation with certain other cases, in one of which (No. 6580) petition for writ of *certiorari* is also submitted. The complete record referred to is No. 6489.

On the 9th day of May, 1925, the Circuit Court of Appeals rendered its decision, holding that the action in the trial court was at law; and, because it was tried to the court without written waiver of a jury, refusing to consider the errors assigned, which were as follows:

(1) Admitting evidence;

(2) Excluding evidence;

(3) Refusing to enter judgment for plaintiffs;

(4) Making findings not supported by the evidence;

(5) Refusing to make other findings.

The decree of the trial court was affirmed. Thereafter, petitioners filed their petition for rehearing, which was denied on the 2nd day of December, 1925.

A transcript of the record in the case, including the proceedings in the Eighth Circuit Court of Appeals, accompanies this petition.

Your petitioners are advised and believe that the judgment of the Circuit Court of Appeals, though made final in said cause by the Judicial Code, is, nevertheless, erroneous, and that this honorable court should require the case to be certified to it for review and determination, in conformity with the provisions of the Judicial Code, for the following reasons:

(1) The decision is in conflict with a rule of law announced by the Ninth Circuit Court of Appeals, and the Sixth Circuit Court of Appeals.

(2) The decision involves an important question of federal law which has not been, but should be, settled by this court.

(3) The decision is in conflict with decisions of the Supreme Court of Oklahoma, and involves property rights of value within that state.

All of which matters are more fully set forth in a brief appended to this petition.

Wherefore, your petitioners respectfully pray that writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the cause entitled, *Edward C. Twist, Albert T. Twist, Jessie L. Payne, nee Twist, et al., Appellants*, v. *Prairie Oil & Gas*

Company, Appellee, No. 6499, to the end that the said case may be reviewed and determined by this court, as provided by the Judicial Code; or that your petitioners may have such other and further relief in the premises as this court may deem appropriate and in conformity with the provisions of law; and that the judgment of the said Circuit Court of Appeals, affirming the judgment of the trial court, and every part thereof, may be reversed by this honorable court and an appropriate judgment rendered therein.

EDWARD C. TWIST, ALBERT T. TWIST, and JESSIE L. PAYNE, nee TWIST, *Petitioners*,

By JAMES S. WATSON,
D. HADEN LINEBAUGH,
PAUL PINSON,
Attorneys for Petitioners.

State of Oklahoma,
County of Muskogee.

Paul Pinson, being first duly sworn, upon oath states that he is one of counsel for the petitioners herein and is acquainted with all of the proceedings had in the above entitled and numbered cause and is familiar with the contents of the foregoing petition, and the facts stated in said petition are true to the best of his knowledge and belief.

PAUL PINSON.

Subscribed and sworn to before me this the 26th day of January, 1926. E. K. Folsom, Notary Public. (Seal) My commission expires September 15, 1927.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

The opinion establishes a rule of law in conflict with the rule of law announced by the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals.

Petitioners, the undisputed owners of an undivided six-fifteenths interest in certain land (R. 9), sued for damages for continuing trespass, for cancellation of recorded conveyances as clouds upon title, injunction and quieting of title (R. 1). In its answer respondent sought a decree dismissing plaintiffs' petition for want of equity and quieting its title (R. 28). Respondent docketed the case as in equity and at the trial stated "this now is a suit in equity" (R. 37). The facts upon which an accounting (obviously necessary) could be had, and all other facts pertaining to the decision, except on the question of fraud and inadequacy of consideration, were stipulated (R. 35). The parties treated the case as in equity. The trial court so treated it. The decree granted equitable relief only (R. 33).

Leoria Weldy, owner of five-fifteenths interest, did not sue. The trial court found in favor of Kuroki and Willie V. Twist, owners of four-fifteenths interest.

The Court of Appeals, affirming the decree, say:

> "The assignments of error disclose that claim is made that the court erred *(1)* in admitting evidence; *(2)* in excluding evidence; *(3)* in refusing to enter judgments for plaintiffs; *(4)* in making findings not supported by the evidence; *(5)* in refusing to make other findings.

"None of these assignments can be considered by this court in view of the form of trial had in the court below. • • •

"It is true that the effect of the trial procedure was not raised in the trial court, nor has it been argued here, but it is the duty of this court to take note of it.

• • • • • • •

"The pleadings being sufficient to support the judgments in the several cases, the judgments are affirmed."

We contend that this was a suit in equity. If so, the Circuit Court is in error by its own opinion.

Equity has jurisdiction to cancel deeds, leases and contracts, to enjoin against continuing trespass and waste, and to quiet title. These are established equitable remedies.

—*Kellogg* v. *Schaeble*, 273 Fed. 1012;

Fay v. *Hill*, 249 Fed. 418 (8th Cir. Appls.);

Black, Rescission and Cancellation, Vol. 2, Sec. 655;

General Film Co. v. *Sampliner*, 252 Fed. 444;

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Chandler Canfield Co. v. *U. S.*, 266 Fed. 145;

Twenty one Mining Co. v. *Original Sixteen to one Mining Co.*, 260 Fed. 724;

Becker Franz Co. v. *Shannon Co.* 256 Fed. 522;

Bispham's Prin. of Eq. (8th ed.), Sec. 31;

Story, Equity Jr., (14th ed.) Vol. 2, Secs. 932-933;

9th Corpus Juris, p. 1160.

The remedy at law was in the plaintiff, for possession and to recover damages, but it was "not adequate, by no means as practical and efficient as a remedy in equity."

—*Chandler Canfield Co.* v. *U. S.*, *supra* (9th Circuit Court of Appeals).

If a court of equity has jurisdiction, it may also dispose of the legal title.

—*Chanslor Canfield Co. v. U. S., supra;*

Becker Franz Co. v. Shannon Co., supra (9th Circuit Court of Appeals);

Equity Rule 23.

Even if the remedy at law be deemed adequate, equity may proceed in the absence of objection. It is not a question of jurisdiction, but of procedure, which may be waived.

—Enc. U. S. Supreme Ct. Rep., Vol. 5, p. 826;

Perego v. Dodge, 163 U. S. 161, 41 L. ed. 113;

Ashland Waterworks Co. v. City of Ashland, 215 Fed. 492;

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Fay v. Hill, 249 Fed. 415, 8 C. C. A.;

Hansell v. Purnell, 1 Fed. (2nd) 266.

And the fact that an action for damages for trespass was included in the plaintiffs' bill, does not oust equity of jurisdiction.

—*Becker Franz Co. v. Shannon Co., supra;*

Twenty-one Mining Co. v. Original Sixteen-to-one Mining Co., supra;

Chanslor Canfield Co. v. U. S., supra.

For the court's convenience we quote pertinent passages from the opinions cited.

Becker Franz Company v. *Shannon Copper Co.*, (Ninth Circuit Court of Appeals):

> "We think the rule to be followed in the Federal Courts is that where, as in the present case, no objection is raised in the trial court to the disposition of the question of the legal title by a court of equity, the objection is waived so far as the appellate court is concerned. (*Elder* v. *McClaskey*, 70 Fed. 529, 17 C. C. A. 251; *Certiorari Denied*, 163 U. S. 685; *Reynes* v. *Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. ed. 934.)"

Chandler Caufield Co. v. *U. S.*, (9th Circuit Court of Appeals):

Here the court, considering Equity Rules 22 and 23, and section 274a of the Judicial Code, dealt with a situation substantially similar to the case at bar. The United States, undisputed owner of land, brought suit to enjoin a continuing trespass by the company which was removing oil therefrom. The company moved to transfer the case to the law side of the court. The defendant's answer alleged that the United States was not in possession, and that the action was in ejectment.

Hunt, Circuit Judge, in the opinion (p. 147) said:

> "Remedy at law for possession and to recover damages for the trespass is in plaintiff, but such remedy is not adequate, by no means as practical and efficient as a remedy in equity. (*Magruder* v. *Belle Fourche, etc., Association*, 219 Fed. 72, 135 C. C. A. 324. In *Johnson* v. *Corson G. M. Co.*, 157 Fed. 145, 84 C. C. A. 593, 15 L. R. A. (N. S.) 1078, there was a serious controversy as to title, hence the case is distinguished from the instant one.

"There is no controversy as to where the legal title to the property here involved rests, and if the defendants have no right to the oil in the lands or to the possession thereof as against the United States, then certainly remedy at law is inadequate to prevent injury of an irreparable character being done to the land, even to the destruction of the value thereof."

Though timely motion was made to transfer, equity rightfully retained jurisdiction. The decree of the District Court for injunction, for damages for trespass, and that all improvements be turned over to the United States (in effect, ejectment), was affirmed.

Twenty-one Mining Co. v. Original Sixteen-to-one Mining Co. (9th Circuit Court of Appeals):

"The original complaint in which the Twenty-one Mining Company was named as sole defendant contains all the essential averments of a bill to quiet title to said vein. * * * It is true that plaintiff has commenced an action at law against the defendant, but such action was not, as alleged, to recover possession of the property in dispute, but solely to recover damages for trespass thereon."

This is exactly the status of the case at bar. The only judgment sought in the plaintiff's first cause of action was a judgment for damages for the trespass.

(p. 727) "The defendants were seeking affirmative relief and the cause was submitted by all parties, not as one already determined by verdict or judgment in the action at law, or as depending upon the result of that action, but as *res integra*, upon which the independent judgment of the court was sought and which was to be decided, not upon the evidence adduced in the law case alone, but upon other additional and independent testimony as well. * * *

"It is not a case here of conferring jurisdiction on the court in a matter not of equitable cognizance. The court, as a court of equity, had and has jurisdiction to quiet title; the bill contains all the allegations necessary for that purpose, all the parties were properly before the court, and all acquiesced in the method of procedure. In such case neither party will be permitted, by the temporary withholding of objections until after the court has announced its decision, to place himself in such advantageous position that, winning, he can accept the fruits of victory, or, losing, escape the burdens of defeat. The decree appealed from therefore cannot be disturbed for lack of jurisdiction."

Hansell v. *Purnell* (6th Circuit Court of Appeals):

"Defendants, who by a cross bill invoke the equity jurisdiction of the court in relation to the same transactions to which the complainant's bill relates and pray for equitable relief, are estopped to deny equity jurisdiction."

Pacific Coal & Transportation Co. v. *Pioneer M. Co.* (9th C. C. A.):

"Now, the allegations of plaintiff's complaint show the action to be equitable. The defendants' denial of possession on the part of the plaintiff cannot oust the court of equity of jurisdiction. If the denial was substantiated at the trial, the issues there remaining, it would defeat the action, because plaintiff would not then have maintained its cause. But another feature is injected into the controversy here, which is controlling. The defendants have not only joined issue with the plaintiff touching the equitable cause as pleaded, but they have set up a like cause, and pray equitable relief, and at the same time they have interposed one or more equitable defenses. By so doing they have waived their objection to the equitable jurisdiction and cannot now be heard to insist upon the legal remedy. *Lee* v. *Evans*,

57 Fed. 677, 6 C. C. A. 500; *Book* v. *Justice Min. Co.*, (C. C.) 58 Fed. 827 * * *" (and other cases).

In *Fay* v. *Hill* (8th C. C. A.) it is held that failure to move to transfer a bill to the law side on the ground that there is a complete and adequate remedy at law, and proceeding to a hearing, is a waiver of the objection. (Syllabus, paragraph 2.) Also, that where an equitable defense is interposed in an action at law, it will have to be disposed of by the court sitting as a chancellor before the trial of the action at law to the jury. And also, a court of equity, having obtained jurisdiction of a suit wherein cancellation of contract for sale was sought, will retain the jurisdiction to dispose of *all controversies between the parties* arising out of the transaction.

Respondent has waived the right to object and is estopped by its actions to raise the question that the plaintiffs' action was at law. This is the clear pronouncement of the cases cited.

Can the appellate court disregard the waiver, revoke the estoppel, and refuse to determine the question presented, for the reasons assigned?

II.

The decision involves an important question of federal law which has not been, but should be, settled by this court.

The question is substantially as stated in the closing paragraph of the last proposition. No definite pronouncement of this court is found, unless it be in *Liberty Oil Co.* v. *Condon Bank*, hereafter referred to.

Stated otherwise, the question is the application of sections 274a and 274b, and Equity Rule 22, to the facts

at bar. We respectfully urge that this court should determine whether the transfer of causes contemplated can be accomplished by the appellate courts.

Section 274a is in these words:

"In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form." (38 Stat. at L. 956.)

Section 274b:

"In all actions at law, equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same right in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree shall be regulated by rule of court. Whether such review be sought by writ of error or appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

Equity Rule 22:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the

> law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

By the petition, answer and reply, in our case the jurisdiction of equity was invoked. By the decree, equitable remedies alone were supplied. If this was not an equity case, nevertheless the defendant has waived the right to raise the question. Now, if it can be raised by the appellate court for the first time, *sua sponte*, Equity Rule 22 and section 274a are mere pitfalls to entrap the unwary litigant. The spirit of this section and rule is emphatically non-technical, yet it would be better to repeal them if they contemplate a transfer by the appellate court. Substantially, that is what the Circuit Court of Appeals accomplished here—a transfer from equity to law.

From *Indian Land & Trust Co.* v. *Shoenfeldt*, 135 Fed. 484, we quote:

> "Prior to this enactment [Rule 22] a suit erroneously commenced on the equity side must be dismissed on motion of defendant or by the court. • • •
>
> "When a court of equity had no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised."

Under the rule, however, if the opinion of the Eighth Circuit Court is correct, when a case is erroneously docketed and tried in equity, no opportunity is afforded to refile when the error is discovered. The appellate court determines the one question, that the litigant s e l e c t e d the

wrong branch of the court, and the case is at an end. This is one error of the trial court which can operate to the disadvantage of the losing party only, and for which the decision is not reversed, but affirmed.

However, if "a suit in equity should have been brought at law" under section 274a, "any party should have the right, *at any stage of the proceedings*, to amend his pleadings" to obviate that objection. If this right had been granted us, the only amendment essential was that established by the trial court's decree—the dismissal of the bill. Then both parties would have been before the court on the prayers to quiet title. One or the other was in possession, therefore equity was the proper remedy. No such opportunity could be afforded us in the appellate court, because "the cause shall proceed and be determined upon such amended pleadings." Clearly the transfer must be made in the District Court, and if not so made, the consequent questions of procedure are waived.

It is important that this court determine the question whether this rule and these sections shall be construed to simplify or to complicate federal practice.

Liberty Oil Company v. *Condon National Bank*, 260 U. S. 235, 67 L. ed. 232, is persuasive that the present decision of the Circuit Court of Appeals is erroneous. The Eighth Circuit Court of Appeals held (271 Fed. 928) that the action was a suit at law, and that, as the bill of exceptions showed no special findings of fact in a cause in which a jury had been waived, but only a general finding for the interveners, the court would not consider the sufficiency of the evidence to sustain the finding. The action was docketed as at law, for money had and received. The defendant

bank, claiming to be a mere stakeholder, asked that other persons be brought in as defendants, and their rights adjudicated. The opinion by Mr. Chief Justice TAFT states that "its answer and cross petition became an equitable defense and a prayer for affirmative equitable relief in the nature of a bill for interpleader."

After citing section 274b of the Judicial Code, the opinion proceeds:

> "This section applies to the case before us. The proceeding was changed by defendant's answer and cross petition from one at law to one in equity, *with all the consequences flowing therefrom.*"

The court suggests that a better practice would have been to transfer the cause to the equity docket as provided conversely in Rule 22. But the failure to transfer did not change the equitable character of the case which "it had taken on by the answer and cross petition of the defendant. The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction between proceedings in law and equity is abolished, and remedies at law and in equity are available to parties in the same court and the same cause." *In other words, the suit was an equitable action because the answer of the defendant made it so.*

The opinion then points out that while these sections (274a and 274b) of the Judicial Code "did not create one form of civil action as do the codes of procedure in the states," yet they

> "manifest a purpose on the part of Congress to change from a suit at law to one in equity, and the reverse,

with as little delay and as little insistence on form as possible, and are long steps toward code practice.

"Coming now to apply those two sections thus construed to the case before us, we find that by defendant's answer and the court's order it became a bill of interpleader in equity. Thereafter the proceedings should have been so treated, both in the trial and appellate courts. The chancellor, having sustained a bill of interpleader, disposed of the controversy between the claimants by directing any method of trial which would best and expeditiously accomplish justice in the particular case (citing cases). This well established rule takes the issues here to be tried out of that class of issues in which there must have been a jury trial under the Seventh Amendment. Where it was one which the chancellor could readily dispose of in one proceeding, it was in the interest of economy, expediency and justice that he should have done so. This is in accord with the general rule in equity embodied in Equity Rule 23, that jurisdiction once assumed should be maintained to the end of the litigation (citing cases)."

This is in accord with the decisions in:

Hansell v. *Purnell*, 1 Fed. (2nd) 266, 8th C. C. A.;

Pacific Coal & Transportation Co. v. *Pioneer Mining Co.*, 205 Fed. 577, 9th C. C. A.;

Vidal v. *Co.*, 276 Fed. 856-7, 2nd C. C. A., syllabus, par. 13;

Fay v. *Hill*, 249 Fed. 415, 8th C. C. A.

We also call attention to the agreed statement of fact in the instant case, which presented for the appellate court a question of law, and not of fact.

—*Ford* v. *Grimmett*, 278 Fed. 140.

III.

The decision is in conflict with the decisions of the Supreme Court of Oklahoma, and involves property rights of value within the jurisdiction of that court.

The petitioners, Cherokee Indian allottees, were wards of the United States, and restricted during minority.

—*Truskett* v. *Closser*, 236 U. S. 223.

The power to lease, on the date specified, was conferred by section 6 of the Act of May 27, 1908 (35 Stat. at L. 312), on the probate courts of the state. These courts become federal instrumentalities for the removal of this restriction, but the procedure for leasing was to be prescribed by the state alone. The right to regulate procedure includes the power to enforce compliance, and implies jurisdiction to determine the effect of non-compliance.

Section 2, article 7, of the Oklahoma Constitution, is in part as follows:

> "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law."

By request of the Interior Department of the United States (see report, Commissioner Indian Affairs, 1914, pp. 50-55) the Supreme Court of Oklahoma promulgated certain rules for the control of the probate courts, Rule 9 being in these words:

> "No oil and gas or other mineral lease covering lands belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed at least five

> days before the same are sold, as provided herein, and notice of such sale must be given by posting and by publication, where publication is practicable, and shall be on ..... of each ....."

In October, 1915, the rules were construed by the Supreme Court of Oklahoma. They were said to be local statutes, of the same effect as if enacted by the legislature. It was held that the probate courts had no power or authority, that is to say, no jurisdiction, to ignore or dispense with these rules.

—*Freeling* v. *Kight*, 49 Okl. 202, 152 Pac. 362.

The extension leases here involved were taken in 1916 (R. 23). The local law at that time as announced in *Freeling* v. *Kight* was in force, and known to respondent. Yet Rule 9 was deliberately violated in that *(1)* no public sale was had to the highest and best bidder; and *(2)* the so-called notice of sale, instead of giving the unqualified announcement that a sale would be conducted on a given date, announced that a hearing would then be held to determine the question of the propriety of such a sale.

At the time the "notice of sale" was posted, no order of sale had been made. No notice could be given till the authority had been granted. The casually interested investor must have been misled by the notice and competition thus prevented. The reason is obvious. The properties (in all the cases) were purchased for $18,(illegible); they were sold shortly after for $250,(illegible). All arrangements for the sale, even to the smallest detail, were made prior to the filing of the petition. The record does not disclose a public sale, but a mere confirmation by the court of the former private agreement.

Such sales are held absolutely void as against the public policy of the State of Oklahoma, in

Winona Oil Co. v. *Barnes*, 83 Okl. 248, 200 Pac. 981;
Carlile v. *National Oil & Development Co.*, 83 Okl. 217, 201 Pac. 377.

It is held that the probate courts have no jurisdiction to order or confirm a transaction of this character.

The federal courts are bound by the local construction of state laws, especially when the interpretation antedates the transaction involved, and this is particularly true where the jurisdiction of inferior state tribunals is the subject in question.

Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349;
St. L. & S. F. Railroad Co. v. *Quinette*, 251 Fed. 773;
Messenger v. *Anderson*, 225 U. S. 436;
Barnett v. *Kunkel*, 259 Fed. 394;
Commercial Bank v. *Buckingham*, 5 How. 317, 12 L. ed. 169;
Balkham v. *Woodstock Iron Co.*, 154 U. S. 177;
Leffingwell v. *Warren*, 67 U. S. 599;
Standard Oil Co. v. *Missouri*, 224 U. S. 270;
Freeport Water Co. v. *Freeport*, 180 U. S. 587.

In a sense Rule 9 is a federal restriction upon the alienation of Indian land. The sovereign guardian of the petitioner procured its enactment by the state court. It was designed to prevent the existence of the situation here presented. It should therefore be so construed as to destroy the evil at which it was aimed. It is of no value unless its violation shall invoke a penalty. The penalty prescribed is

not confiscatory, since the decisions require reimbursement for the expense of development.

—*Barnes* v. *Winona Oil Co.*, 83 Okl. 253, 200 Pac. 985.

Conveyances violating federal restrictions generally are held void, and this should furnish an additional reason for following the local decisions here.

—Act May 27, 1908, Sec. 5;
Truskett v. *Closser*, *supra*;
Heckman v. *U. S.*, 224 U. S. 413;
Goat v. *U. S.*, 224 U. S. 458.

As shown by the record, the amount involved is such that it is probable either party will seek a final decision by this court. If the cause shall be remanded to the Circuit Court with instructions to determine the merits, the litigation will be unduly prolonged. Therefore, we urge in the interest of expediency that the matter be heard and determined on its merits by this court in the present state of the record.

—*Liberty Oil Co.* v. *Condon National Bank*, *supra*.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 301.

EDWARD C. TWIST, *Petitioner,*

vs.

PRAIRIE OIL & GAS COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* PETITIONER.

Statement of the Case.

In this case, trial and appeal were had jointly with No. 302, *Twist, et al., v. Prairie Oil & Gas Company.* By stipulation, the complete record was printed only in No. 302, the record in this case being prepared only so as to show the difference in detail, such as description of land. All questions presented are identical, and all references to the record refer to No. 302, unless otherwise specified.

Petitioner, a Cherokee Indian allottee, sues to cancel a certain "extension lease" executed during his minority to the Los Angeles Cherokee Oil Company, and by it assigned to the respondent, Prairie Oil & Gas Company. The claim is for damages for continuing trespass, for cancella-

tion of recorded lease as cloud upon title, injunction and quieting of title (Tr., p. 9).

The suit was instituted in the state court, and by virtue of the Oklahoma code, joined an action for damages as one cause of action, with the equitable claims referred to as a second cause of action.

The so-called "extension lease" was executed by the guardian in the course of certain proceedings appearing at pages 11-20 of the transcript. The original lease expired on March 21, 1920. Other "extension leases," including the one involved in No. 302, now before the court, were included in the same petition, and it was contended that the extension agreement (Tr. #301, p. 8) was secured by fraud, duress and false dealings (Tr. #301, p. 4). Also that the proceedings were insufficient to authorize the court to approve such a sale in behalf of minors, by virtue of Probate Rule 9, promulgated by the Supreme Court of Oklahoma on June 11, 1914 (Tr. #301, p. 4).

The respondent removed the case to the Federal Court on the ground of diversity of citizenship and caused it to be docketed as a case in equity. Respondent answered (Tr. #301, p. 10) and prayed "that the court, by its decree, declare and determine that the defendant's title to said oil and gas lease, as modified and extended, is good, valid and subsisting as against any claim of the plaintiff, and that its title thereto be quieted as against said claims."

The facts upon which an accounting could be had, and all other facts necessary to a decision, except on the question of fraud and inadequacy of consideration, were stipu-

lated (Tr., pp. 43-51). The parties and the trial court treated the case as one in equity, and the decree granted only equitable relief (Tr., pp. 41-42).

The Court of Appeals, when the matter was presented, held in its opinion (Tr., p. 94) in substance, that only the legal cause of action could be maintained in the Federal Court, and that the equitable cause of action could not, since there was an adequate remedy at law, the plaintiff being out of possession, and the defendant in possession, and that by reason of the fact that there was no waiver of jury, as provided by law, the court had no jurisdiction to review any question except those which arise on process, pleadings or judgment. The court refused to review the evidence and affirmed the judgments in favor of respondent on the ground that the pleadings were sufficient to support them.

ARGUMENT *and* AUTHORITIES.

If this was a suit in equity, then the appeal was the proper remedy, and the appellate court should have reviewed the evidence as well as the pleadings and the judgment. The relief sought by way of cancellation of leases, injunction against continuing trespass, and to quiet title, are all of an equitable nature.

Kellogg v. Schaechle, 273 Fed. 1012;

Fay v. Hill, 249 Fed. 418 (8th Cir. Appls.);

Black, Recission and Cancellation, Vol. 2, Sec. 655;

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Bispham's Prin. of Eq. (8th ed.), Sec. 31;

Story, Equity Jur. (14th ed.), Vol. 2, Secs. 932-933;

9th Corpus Juris, p. 1160.

The remedy at law was in the plaintiff, for possession and to recover damages, but it was "not adequate, by no means as practical and efficient as a remedy in equity."

—*Chanslor Canfield Co.* v. *U. S.*, *supra* (9th Circuit Court of Appeals).

If a court of equity has jurisdiction, it may also dispose of the legal title.

—*Chanslor Canfield Co.* v. *U. S.*, *supra*;

Becker Franz Co. v. *Shannon Co.*, *supra* (9th Circuit Court of Appeals);

Equity Rule 23.

Even if the remedy at law be deemed adequate, equity may proceed in the absence of objection. It is not a question of jurisdiction, but of procedure, which may be waived.

—Enc. U. S. Supreme Ct. Rep., Vol. 5, p. 826;

Perego v. *Dodge*, 163 U. S. 161, 41 L. ed. 113;

Ashland Waterworks Co. v. *City of Ashland*, 215 Fed. 492;

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Fay v. *Hill*, 249 Fed. 415, 8th C. C. A.;

Hansell v. *Parnell*, 1 Fed. (2nd) 266.

And the fact that an action for damages for trespass was included in the plaintiff's bill, does not oust equity of jurisdiction.

—*Becker Franz Co.* v. *Shannon Co.*, *supra*;

Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co.*, *supra*;

Chanslor Canfield Co. v. *U. S.*, *supra*.

The fact that there was an agreed statement of fact, as to every allegation except fraud and inadequacy of consideration, takes the case out of the rule as to trial of questions of fact without written waiver of jury.

—*Ford* v. *Grimmett*, 278 Fed. 140.

Quotations from various cases above cited appear in the brief appended to the petition for the writ.

Sections 274a and 274b of the Judicial Code, and Equity Rule 22, clearly contemplate that causes erroneously docketed shall be transferred by the trial court. In this case the appellate court substantially accomplished a transfer of a cause, treated by the trial court and by all parties as one in equity, to the law docket, and consequent dismissal. If transferred by the trial court, the right to amend

the pleadings under section 274a is granted at any stage of the pleadings. But the cause must proceed and be determined upon such amended pleadings, and as no opportunity is afforded in the appellate court for amendment, this right has been denied us.

The defendant's answer, invoking equitable relief, changed the proceeding "from one at law to one in equity, with all the consequences flowing therefrom."

—*Liberty Oil Company* v. *Condon National Bank*, 67 L. ed. 232; 260 U. S. 234.

Prior to the enactment of Rule 22, a suit erroneously commenced on the equity side must be dismissed. And the decree of dismissal must expressly adjudge that it is rendered for that reason, "to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised."

—*Indian Land & Trust Co.* v. *Shucksfeldt*, 133 Fed. 484.

Unless the transfer may be accomplished only in the trial court, Rule 22 and sections 274a and 274b have complicated, rather than simplified, the practice. This is not the spirit of these enactments. They

> "manifest a purpose on the part of Congress to change from a suit at law to one in equity, and the reverse, with as little delay and as little insistence on form as possible, and are long steps toward code practice."
>
> —*Liberty Oil Company* v. *Condon Bank*, *supra*.

The opinion in that case is in accord with the decisions in:

Hansell v. *Pursell*, 1 Fed. (2nd) 266, 8th C. C. A.;

Pacific Coal & Transportation Co. v. *Pioneer Mining Co.* 205 Fed. 577, 9th C. C. A.;
Vidal v. *Co.*, 276 Fed. 856 7, 2nd C. C. A., syllabus:
Fay v. *Hill*, 249 Fed. 415, 8th C. C. A

So much for the question of practice. If the court shall see fit to review the decisions of the trial court and of the 8th Circuit Court of Appeals, in the interest of expediency the case should also be determined on the merits.

—*Liberty Oil Co.* v. *Condon National Bank, supra.*

We, therefore, pass to a consideration of the merits of the case:

The petitioner, a Cherokee Indian allottee, was a ward of the United States and restricted during his minority.

—*Truskett* v. *Closser*, 236 U. S. 223

The power to lease, on the date specified, was conferred by section 6 of the Act of May 27, 1908 (35 Stat at L. 312), on the probate courts of the state. These courts became federal instrumentalities for the removal of this restriction but the procedure for leasing was to be prescribed by the state alone. The right to regulate procedure includes the power to enforce compliance, and implies jurisdiction to determine the effect of non-compliance.

Section 2, article 7, of the Oklahoma Constitution, is in part as follows:

> "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law."

By request of the Interior Department of the United States (see report, Commissioner Indian Affairs, 1914, pp. 50-55) the Supreme Court of Oklahoma promulgated certain rules for the control of the probate courts, Rule 9 being in these words:

> "No oil and gas or other mineral lease covering lands belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed at least five days before the same are sold, as provided herein, and notice of such sale must be given by posting and by publication, where publication is practicable, and shall be on ..... of each ....."

In October, 1915, the rules were construed by the Supreme Court of Oklahoma. They were said to be local statutes, of the same effect as if enacted by the legislature. It was held that the probate courts had no power or authority, that is to say, no jurisdiction, to ignore or dispense with these rules.

—*Freeling* v. *Kight*, 49 Okl. 202, 152 Pac. 362.

That decision had been rendered approximately eight months before the occurrence herein involved. Kight, county judge, was compelled by mandamus to observe the rules of which Rule 9 above is a part.

In *Ex parte Virginia*, 25 L. ed. 669-673, 100 U. S. 313, it is said:

> "It is well settled that the writ of mandamus will issue to correct the action of subordinate or inferior courts or judicial officers *where they have exceeded*

their jurisdiction, and there is no other adequate remedy."

Also:

"In what cases such a writ (mandamus) is warranted by the principles and usages of law, it is not always easy to determine. Its use has been very much extended in modern times and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that which they are in theory and by virtue of their office bound to do. *It does not lie to control judicial discretion*, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion and *outside the jurisdiction of the court* or officer to which or to whom the writ is addressed."

The rules, by this decision, are held to be, not directory, but mandatory. In other words, the probate courts of Oklahoma are without jurisdiction to dispense with these rules.

Following the *Knight* case, as we observed in our former brief, the Supreme Court of Oklahoma, in *Winona Oil Co. v. Barnes*, 83 Okl. 248, and *Carlisle v. National Oil Development Co.*, 83 Okl. 217, held that probate courts had no jurisdiction to order or confirm a transaction which was not in substantial compliance with Rule 9, requiring a sale in open court to the highest and best bidder, after public notice thereof; and that such confirmation and sale were absolutely void.

These decisions determine that the rule is a local statute, and that the court is without jurisdiction to disregard it.

The federal courts are bound by the local construction of state laws, especially when the interpretation antedates

the transaction involved; and this is particularly true where the jurisdiction of inferior state tribunals is the subject in question.

—*Kuhn* v. *Fairmount Coal Co.*, 215 U. S. 349;
St. L. & S. F. R. Co. v. *Quinette*, 251 Fed. 773;
Messenger v. *Anderson*, 225 U. S. 436;
Barnett v. *Kunkel*, 259 Fed. 394;
Commercial Bank v. *Buckingham*, 5 How. 317, 12 L. ed. 169;
Baldwin v. *Woodstock Iron Co.*, 154 U. S. 177;
Leffingwell v. *Warren*, 67 U. S. 599;
Standard Oil Co. v. *Missouri*, 224 U. S. 270;
Freeport Water Co. v. *Freeport*, 180 U. S. 587.

In a sense Rule 9 is a federal restriction upon the alienation of Indian land. The sovereign guardian of the petitioners procured its enactment by the state court. It was designed to prevent the existence of the situation here presented. It should therefore be so construed as to destroy the evil at which it was aimed. It is of no value unless its violation shall invoke a penalty. The penalty prescribed is not confiscatory, since the decisions require reimbursement for the expense of development.

—*Barnes* v. *Winona Oil Co.*, 83 Okl. 253, 200 Pac. 985.

Conveyances violating federal restrictions generally are held void, and this should furnish an additional reason for following the local decisions here.

—Act May 27, 1908, Sec. 5;
Truskett v. *Closser*, *supra*;
Heckman v. *U. S.*, 224 U. S. 413;
Goat v. *U. S.*, 224 U. S. 458.

If the Oklahoma decisions are to be followed, and if the court shall entertain our appeal, then the judgment should be reversed and judgment rendered in favor of petitioner, with instructions to the court to hear the matter further solely upon the question of accounting for oil and gas removed under the extension leases since the date of the trial in the court below.

If, however, the court shall hold that the Oklahoma decisions are inapplicable, nevertheless the extension leases should be cancelled by reason of the fact that they were obtained for a grossly inadequate consideration, in an irregular manner, and that they are tainted with fraud and unfair dealings.

Gross Inadequacy of Consideration.

The extension of lease here involved was one of a number executed by virtue of a petition (Tr., p. 15) and an order of the County Court of Tulsa County (Tr., p. 18) in consideration of the sum of $18,000.00 in cash, increase of the royalty from ten (10) per cent to twelve and one-half (12½) per cent, and the drilling of a well on each of the tracts within six months from the date thereof, June 16, 1916. At that time oil was of the value of $1.35 per barrel (Tr., p. 47). On March 5, 1917, these leases were assigned to the Prairie Oil & Gas Company, they paying for the William G. Twist lease, $112,561.62; for the Albert Twist lease, $45,556.87; for the Jessie L. Twist lease, $43,870.39; and for the Edward C. Twist lease, $49,377.38, a total of $251,366.25. (Tr., p. 48.)

Of course, this amount includes not only the value of the "extensions" but the value of the original leases.

The court refused to permit us to prove the market value of the leases (Tr., p. 70), not only upon the ground that the witness offered was not qualified, but upon the ground that to show the market value was to "assail in this collateral proceeding the judgment of the County Court as to the sufficiency and adequacy of the consideration." (Tr., pp. 70-71.) This is equivalent to holding that gross inadequacy of consideration is immaterial as a matter of law. The court should have heard this evidence.

> "Even though objections to questions are sustained in equity cases, it is the court's duty to have them answered and included in the record so that if the appellate court finds that the chancellor erred the cause need not be remanded to have the testimony retaken."
>
> *Uokle, et al.* v. *Wells, et al.*, 381 Fed. 29.

There is, however, sufficient evidence in the record to disclose the complete inadequacy of the consideration. At least we may determine the value placed upon the extensions by the respondent, the Prairie Oil & Gas Company, by deducting from the amount of $251,000.00 plus, paid by it, the value of the original leases during the remainder of their terms. The production is known, the value of oil is known, and the terms of the leases are fixed. The expenses of operation are established by agreement. Hence, it is a simple question of arithmetical computation to ascertain the net value of the leases during the remainder of their term.

When the petition was filed by the guardian in the Probate Court (Tr., p. 13), the William G. Twist average royalty was 8.53 barrels; the Albert T. Twist was 2.27 barrels, the Edward C. Twist was 2.45, and Jessie L. Twist, 3.95 barrels. This is 10% of the value of the crude oil produced (Tr., p. 13), being a total of 17.2 barrels. Hence, the lessee's production is 9 times the royalty, or 154.8 barrels, on June 5, 1916. On March 5, 1917, when the Prairie took its assignment (Tr., p. 46) it had already, in February, 1917, paid the price mentioned and the daily production was at that time 104.81 barrels (Tr., p. 49).

The Los Angeles Cherokee paid $18,000.00, an increase of 2½ per cent in royalty, and the drilling of certain additional wells as a consideration for the "extensions." The Prairie paid them $251,000.00 plus, assumed the additional royalty and assumed the drilling of the additional wells. There was no development between the 16th day of June, 1916, and the 1st day of March, 1917, by the Los Angeles-Cherokee or any other person (Tr., p. 67).

The William G. Twist lease expired September 28, 1919, and hence, from March 5, 1917, had 936 days to run. The Albert T. Twist lease expired September 3, 1918, and had, therefore, 543 days to run; the Edward C. Twist lease expired March 21, 1920, and therefore had 1111 days to run; and the Jessie L. Twist expired March 21, 1920, having 533 days to run (Tr., p. 12). The production, as we have seen, had fallen off approximately one-third; that is, from 154 barrels to 104 barrels, between the date of the "exten

sion of the leases" and the date of the assignment of the "extension." The market value at the time of the purchase was $1.70 per barrel (Tr., p. 69). Take the William G. Twist lease, producing 8.53 barrels of royalty (Tr., p. 13), multiply this by 9, and we find the lessee's production is 76.77 barrels. Reducing this by one third, we find the production on March 5, 1917, to be 51.18 barrels. At a market price of $1.70 per barrel, this would yield $87.00 per day, to the lessee, or a total in 936 days of $81,432.00.

Applying the same method of computation to each of the other leases, we find a total expected or anticipated production during the remainder of their terms, gross, of $126,946.76. Averaging the expenses of operating over the entire period, as shown by the transcript, pages 46, 48 and 49, we find the daily expense on the William G. Twist lease to be $22.36; on the Albert T., $20.63; on the Edward C., $18.20; and on the Jessie L., $7.63. Multiplying in each instance by the number of days which the lease had yet to run, we find a total production expense of $56,418.04. This leaves a net profit, if the leases maintained their average output, as of the date of the purchase, during the remainder of their terms after the Prairie purchased the assignments, of $70,528.72.

We are giving the Prairie the benefit of the assumption that the leases would not depreciate in production during that period. This the court judicially knows is not true. They had decreased one-third within the period of nine months. It appears that they had decreased to 65 barrels (Tr., p. 49), at the time of the trial, or about five years

after the assignment. However, we are content to assume that the Prairie, through its experienced officers, was able to predict that they would earn the full amount of the profit as shown above during the remainder of the terms of the leases, and that they were content to make no money on that portion of their purchase, but that they paid for the original leases every dollar which they could earn out of them, that is, $70,000.00. If the Prairie did so estimate, then they either made a tremendously bad bargain, or they deemed the market value of the "extensions" greater than the remaining amount paid; that is, approximately $180,000. We cannot assume that the purchaser was engaged in an altruistic enterprise.

We have suggested that the drilling of additional wells is no consideration. There is a duty of diligent development, regardless of contract, on producing oil property.

—*Strange* v. *Hicks*, 78 Okl. 1, 188 Pac. 347;

Pelham Petroleum Co. v. *North*, 78 Okl. 39, 188 Pac. 1049;

Indian Co. v. *McCrory*, 42 Okl. 136, 140 Pac. 610;

Blackwell Oil & Gas Co. v. *Whitesides*, 71 Okl. ...., 174 Pac. 573;

Brewster v. *Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213.

In spite of the refusal of the court to permit us to prove the adequacy of the consideration, we believe that our computation establishes that the respondent paid more than ten times as much for the extensions as the minors

received; and this within nine months of the date of the "extensions" and after the production had decreased approximately one third. We make no point of this decrease in production, except to say that it is off set in some measure by the increase in the price of oil. If they paid ten times as much as the minors received, they can hardly be heard now to say that the consideration paid to the minors was not grossly inadequate.

Irregularity of Proceedings.

Even if the court should determine that the decisions of the Supreme Court of Oklahoma will not be followed as a rule of property and that the County Court had jurisdiction to proceed, we call attention to the following obvious irregularities in the sale proceedings which may be observed by reference to Exhibits "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L." (Tr. 302, pp. 10-34; Tr. 301, pp. 8-9.)

(a) In the petition, instead of asking for the right to sell a valuable property of the minors, the guardian sets out that she and the Los Angeles Cherokee Oil Company have entered into a tentative agreement which she desires the court to approve.

(b) The guardian appears not only as the guardian of one minor, dealing with one estate, but as the guardian of three minors, who own their own allotments, and who together with herself own the lands of William G. Twist, and also as the administratrix of Wm. G. Twist, deceased a

proceeding contrary to the rule announced in *Jackson* v. *Carroll*, 207 Pac. 735 (Okla.).

(c) The petitioner seeks to have the agreed sum of money to be paid for the leases pro rated according to the average royalty on the different tracts. This arrangement does not take into consideration the number of wells on each tract, the age and condition of each well, the extent of undeveloped acreage of each tract, nor the time of termination of the original leases. Each of these items was an important factor in determining the value of the extension sold. The Wm. G. Twist lease contained more than 80 acres and expired September 28, 1919; the Albert Twist lease contained 30 acres, and expired September 3, 1918; the Edward C. Twist contained 30 acres, and expired March 21, 1920; the Jessie L. Twist lease contained 80 acres, and expired December 7, 1918. It is obvious that the mere average current royalty could not determine the value of the various extensions respectively, and that this was but an arbitrary agreement, without regard to value.

(d) The prayer is that the guardian be "permitted to enter into an agreement extending the term," obviously with the Los Angeles Cherokee Oil Company.

(e) The court, in its "order setting date of hearing petition for sale of extension of leases," mentions "the petition praying leave of the court to extend the lease" and orders that the petition be set for hearing on the 10th day of June, 1916, at 10:30 o'clock a. m. —not that the extensions be then sold.

(f) There was no order of sale.

(g) The notice was not published, but posted in three public places, "publication being not practicable."

(h) On the 16th day of June, Mrs. Welty, as the guardian and as the administratrix, files report and return on sale of extension of oil and gas mining leases, to the Los Angeles Cherokee Oil Company. In this report she says (Tr. #302, pp. 15-17), that she has executed and delivered certain oil and gas mining leases to the Los Angeles Cherokee Oil Company "in accordance with the prior order of this court setting date for hearing of her petition for sale of said oil and gas lease." The cash bonus, it is said, is to be pro rated according to certain agreements already entered into between the guardian and the Los Angeles Cherokee Oil Company.

(i) The order of court refers to the fact that the guardian filed a petition "praying for the extension of the term of certain oil and gas leases," and finds that "due and proper notice of said *hearing* has been given." The court was of the same view as we are, that there had been no notice of *sale*, but notice of *hearing* of petition. The court also finds that oil and gas leases had been executed and that the guardian is satisfied that the proposition is beneficial and should be approved, and that the guardian should enter into the agreement extending the terms of the leases. Immediately the court recites that it has examined the agreements and approves and confirms the same.

(j) The "notice of sale," so called (Tr. p. 33), purports to give notice that in pursuance of an order of the County Court, sale would be had at 10:30 a. m., on the 16th day of June, 1916, in the County Court room in Tulsa "*at which time and at said place any person may appear to contest the sale of such extensions or show cause why such lease or leases should not be extended* from the date of the expiration of the present leases * * * and if any objections there be same to be filed in writing at the same time and place." If notice of sale in proper terms had been given, the guardian had no authority to give it, because the court had not yet heard the petition, nor had the court directed that a sale be had. The court did not sign the notice of sale. That was a function assumed by the guardian and administratrix. The court had not authorized a sale, and therefore had not authorized a notice of sale. The court had merely made an order setting a date upon which the petition would be heard. (Tr. #302, pp. 14-15.) The guardian had no authority, upon this character of order, to advise the public that a sale would be had upon that date. We suggest that it is obvious no contemplating purchaser would be present on that day. The only persons who would be attracted by such a notice would be those who desired to present an objection to the order of sale. In other words, persons who not only did not desire to purchase, but who desired to prevent others from purchasing. The cases of *Clauton* v. *Tibbens*, 298 Fed. 18; *Jackson* v. *Gates Oil Company*, 297 Fed. 549, and *Duff* v. *Keaton*, 124 Pac. 291, all dealt with sales of leases prior to the adoption of Rule 9 of the Supreme Court; there was, nevertheless, an order of sale;

after which the guardian made a return of sale, pursuant to the order, stating that she had secured the best purchaser and the highest price obtainable, and the court then approved and confirmed the lease. In each of those there was a compliance, as held by the court in *Duff* v. *Keaton*, with the procedure prescribed for the sale of personal property within the State of Oklahoma. The present case discloses no effort to comply with any of the customs or forms commonly observed in such cases.

If the court had jurisdiction, nevertheless the proceeding was at best decidedly irregular.

Fraud.

The evidence with relation to fraud appears in the transcript, on pages 52 to 63, inclusive. It discloses that the guardian of the minors was a widow, in poor health. Pitt and Anderson (doubtless the same persons who represented the Los Angeles Cherokee Oil Company in their negotiations with the Prairie for the sale of the leases (Tr., p. 48)) urged upon her the expediency of executing an extension, so that the lease should continue as a perpetual right in the land. They became her bondsmen in the guardianship. They stated positively to her that the sum of $18,000.00 was more than the extensions were worth. They informed her that she was not doing right by her wards if she did not accept this sum. They intimated that the County Court would not look with favor upon her refusal to execute these agreements. They advised that the eyes of other persons were upon the guardianship, expecting her to

fear that the court would remove her and place the affairs of her children in strangers' hands. We were not permitted to show what representations were made to her son and communicated to her, although we endeavored to prove those representations (Tr., pp. 64-65). The petitions were prepared by the Los Angeles Cherokee Oil Company's attorney, Mr. Pitt stating that he did not think it was necessary for her to have an attorney (Tr., p. 63). There was no person present the day of the purported sale except Rice or Lyon, one of the attorneys for the company; Mr. Pitt, the company's agent; and the guardian.

We have before discussed the inadequacy of consideration, and in that connection, have disclosed the fact that the value of the extensions, as estimated by the Prairie for the purpose of purchase, and as actually paid for in cash, was approximately $180,000.00. Positive statements were made by the agents of the Los Angeles-Cherokee Company to the effect that $18,000.00 was more than they were worth (Tr., p. 58). We must assume that the verified petition of the guardian was induced by this positive statement, and that her actions were influenced thereby. The men making it must have had a knowledge of the falsity of the statements which they made. They were in a position to know the value of the leases; the mother is not shown to have had such knowledge; and she acted without the aid of counsel, upon the suggestion of parties adversely interested.

"Representations as to value, deliberately incorrect, and fraudulently made, are actionable."

—*Lumber Co.* v. *Ott*, 142 U. S. 622, 35 L. ed. 1136;

Hood v. *Wood*, 61 Okl. 294, 161 Pac. 210;

Wedine v. *Aldred*, 57 Okl. 391, 157 Pac. 305;

Dalton v. *Hooper* (Okl.), 177 Pac. 571.

The Prairie Oil & Gas Company pleaded it was a bona fide purchaser. That, however, "is an affirmative claim and must be proven by the party who seeks its benefit."

—*Barnett* v. *Kunkel* (8th C. C. A.), 259 Fed. 394;

Wright-Blodgett Co. v. *U. S.*, 236 U. S. 397, 59 L. ed. 637.

There was no evidence offered to support this plea except the agreement that Dana H. Kelsey would testify, if present, that he acted for the Prairie in the purchase, in connection with Fred S. Cook, and that Mr. Kelsey would testify that he knew nothing of the transactions between the guardian and the Los Angeles Cherokee Oil Company, and that Anderson and Pitt did not inform him, at the time of the examination of the abstracts, of the matters, conversations or transactions between the Los Angeles Cherokee Oil Company and the guardian. Fred S. Cook is absent without explanation. There is no evidence in the record that he was unaware of the nature of the transactions, or of the conversations between Pitt and Anderson, on the one hand, and the guardian on the other.

Moreover, the known facts are sufficient notice that some improper activities had existed. The Prairie knew that it was buying for approximately $180,000.00 property

which had depreciated in value and which had been purchased for $18,000.00 within seven or eight months before. Bear in mind that no additional development or improvement had occurred. The Prairie knew that the probate rules of the Supreme Court had not been complied with, in that there was no competitive bidding, no order of sale, and no proper notice of sale. In the presence of the glaring irregularities, and with positive knowledge of the vast discrepancy in the prices paid, a purchaser cannot contend that he is in the exercise of good faith. He has shut his eyes to obvious facts and closed his ears against information.

We contend, moreover, that there is fraud on the face of the entire proceedings.

One must be impressed with the view that it was fraudulent to insert in the agreement the fact that the drilling of an additional well, within six months, was a part of the consideration. This was no consideration. It was but the agreement to do that which they were already bound to do. The increase in royalty was but another subterfuge and pretended consideration. For the leases under which the Los Angeles Cherokee claimed were governed by the regulations of the Department of the Interior, being leases upon minor Indian land. Under the regulations of April 20, 1908, section 15A: "The minimum rate of royalty on oil on and after May 1, 1908, shall be 12½ per cent of the gross proceeds of the oil produced from said leased premises." Whether this condition could have been enforced against the lessee or not, the regulation serves to indicate that any changed or extended lease which might

come within the jurisdiction of the Department of the Interior would have contained the 12½ per cent royalty provision. That this is the customary royalty will not be denied. Moreover, it was but a trifling consideration at best that the royalty be increased 2½% during the remaining short term of the leases. What the royalty was to be after the leases expired is immaterial.

The face of the notice itself is so ambiguous that it must be construed as fraudulent. It was not the intention of the parties that a public sale should be had; the whole arrangement was a private agreement; the only order of the court prior to the sale was the order that the petition should be heard; and the petition was for leave to execute the extension agreement to the Los Angeles Cherokee Oil Company. The price, terms and conditions had all been agreed upon. The agreements were executed privately. There was no hearing had, as provided by the order of the court; the notice purported only to give to those interested an opportunity to object to the granting of the petition; that is to say, to object to the granting of the extension to the Los Angeles Cherokee Oil Company; not to give to purchasers an opportunity to bid.

In the nature of things an extension of the old lease could only be made to the person who then owned it. A stranger could not bid upon the extension of a lease owned by some one else. In order to be absolutely fair to the minors, it perhaps would have been necessary for a new lease to be sold, effective upon the expiration of the old, on each tract. But the face of the notice itself, the method of

conducting the sale, and the obvious irregularities, impress us with the view that the proceeding was deliberately designed to secure the property without the presence of any other bidders, and to conceal from the public at large the nature of the proceeding to be had on June 16, 1916; while, in a measure, appearing to comply with the laws of the state.

Conceding the gross inadequacy of consideration, the irregularities in the sale, and the fraud and unfair dealings, the case *of Schroeder* v. *Young*, 161 U. S. 334, 40 L. ed. 721, is peculiarly applicable. In that case, as in the case at bar, a judicial sale was the subject of controversy. The sale had been confirmed and a suit in equity brought to set aside the sale. The property had been sold for a little more than $17000.00, while the trial court found it to be worth $26,000.00. The court, referring to the argument that the proceedings were irregular, observed in the language of Mr. Justice Bradley, in *Graffam* v. *Burgess*, 117 U. S. 180, 29 L. ed. 839:

> "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed the greater the fraud intended the more particular the parties to it often are to proceed according to the strictest forms of law."

In the opinion by Mr. Justice Brown, it is said:

> "Plaintiff relied mainly for a decree in this case upon the fact that his interest in the property in question, which the trial court found to be worth $26,000.00, was sacrificed at these several judicial sales to pay a judgment of little more than $17000.00."

It will thus be seen that the principal allegation was the inadequacy of consideration. It was this fundamentally upon which the court of equity seized; it is upon the fact that a wrong has been done that equity bases the vigilant exercise of all of its powers, to protect the wronged.

The court in this case, however, proceeded to find certain irregularities, none of which amounted to a fatal defect, but among which are recited the following:

(a) The property was sold to Stephens and Schroeder, who had acted as attorneys for the judgment creditor throughout the entire transaction. Compare this to the instant case, where the guardian was not represented by counsel, but the attorneys for the purchasing company carried the entire transaction through the courts.

(b) "At neither of the sales was there any other bidder and no other person present than Stephens and the officer conducting the sales, and we can readily appreciate how inevitable it was that the property should be sacrificed." In that case, however, there was an opportunity for other bidders to appear. In the present case there was not only no other bidder present; there was no opportunity given to bidders to be present. The only right which the County Court granted by its order was the right to appear and show cause why an order of sale should not be made.

(c) Another reason was that there was an irregularity with regard to the amount of the levy on one execution. Compare this with the irregularities in the sale before the court, *viz.*, the failure to observe Rule 9, the bulk sale, the order to lease to a particular lessee for a specified price.

These are the chief irregularities which the court considered in that case, and of them, taken with the gross inadequacy of consideration, it is said:

> ***"It would be a reproach to a court of equity if it could not lay hold of such a transaction as this is shown to be and set aside a sale of property acquired under the forms of law, and in defiance of natural justice."***

How much more reasonable to set aside the transaction had with helpless minors; not only "in defiance of natural justice," but in defiance of the rules of procedure prescribed by two sovereign governments for the protection of the particular class of persons here affected. Can there be any doubt of inadequacy of consideration here? If so, the court should have permitted us to prove its inadequacy. In that direction we were not permitted to proceed.

In *Wheeler & Motter Mercantile Co.* v. *Wright*, 64 Okl. 97, 166 Pac. 184, the Supreme Court of Oklahoma said in part:

> "A judgment sale will not be set aside for mere inadequacy of price unless it is so great as to shock the conscience. A sale may be set aside for gross inadequacy of price, if accompanied by circumstances showing unfairness in the conduct of the successful bidder, or any circumstances sufficient to raise a presumption of fraud" (syllabus, paragraph 1).

Again, in *Schroeder* v. *Young*, *supra*, the court says:

> "While mere inadequacy of price has rarely been held sufficient itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances, impeaching the fairness of the transaction, as a cause for vacating it, especially if the inade-

quacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as *if several lots have been sold in bulk where they should have been sold separately*, or sold in such manner that their full value could not be realized; *if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security;* or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price—the sale may be set aside, and the owner may be permitted to redeem."

We call particular attention to the reference to the sale in bulk as grounds for setting aside a judicial sale.

This is a judicial sale. Hence the importance of the decision of the Supreme Court of Oklahoma in *Jackson* v. *Carroll*, 86 Oklahoma 230. There the fact that a sale of separate interests was sold in bulk was made the basis of a successful collateral attack upon the judgment of the County Court. The facts were similar to the sale in the case at bar. This recognition of the doctrine by the Supreme Court of the United States, coupled with the express decision of the Supreme Court of Oklahoma, should be sufficient in our judgment to warrant this court in reversing upon the sole ground that the interest of each of three minors in his own allotment was sold jointly with the interests of those three and two others in the allotment of the deceased father, all at a bulk price, for one consideration, without determining the value of each one, except by an arrangement suitable to the purchaser himself, and without the court's passing upon the proper valuation to be given to each interest.

In other words, we have here, for the benefit of the purchaser alone, a lump sum sale of eight different individual properties; namely, three individual allotments and the separate interests of five different persons in a fourth allotment, all for the gross sum of $18,000.00 and a certain advance in royalty.

We believe the rule in these cases is salutary, and justifies our position here. It is a complete answer to the contention which will doubtless be made, that the question of value was directly determined by the probate court, and that its judgment that the price is adequate is sufficient.

Moreover, there is a clear distinction between proceedings *ex parte* and proceedings adversary, when we consider the force and effect of the judgments rendered, and the character of proceedings necessary, to overthrow such judgments. In an adversary proceeding, fraud or perjured testimony is not sufficient to overthrow the judgment. The fraud must be extrinsic to the proceedings, because the court passes upon the question of the evidence with both parties before it, and determines whether there had been perjury committed. This, however, was an *ex parte* proceeding. A guardian represented herself and the minors' interests. She made the petition. It was not contested, and her petition was furthered and fostered by those persons adversely interested. There was no evidence submitted. In such a proceeding fraud or false testimony vitiates the entire proceeding. Compare, *United States* v. *Minor*, 114 U. S. 233, with, *United States* v. *Throckmorton*, 98 U. S. 61.

The fraud here was both extrinsic and intrinsic.

Moreover, the irregularities are apparent on the fac
of the record. Coupled with inadequacy of consideration
they are sufficient grounds for equity to interfere. And the
are sufficiently obvious to prevent the defense of bona fide
by the respondent.

We respectfully urge therefore:

(1) That the decision of the Eighth Circuit Court o
Appeals be reversed, as well as that of the trial court; and

(2) If the court shall hold the Oklahoma decision
applicable, then that this court render such judgment a
should be rendered upon the record, declaring the lease
void and remanding for an accounting; and

(3) If said "extension leases" shall be held voidable
only, then that this cause be remanded for new trial; or

(4) That the court render such other and further orde
as shall protect the interests of the petitioners herein an
restore them to the rights which they have lost by reason
of the judgments of the District Court and of the Circu
Court of Appeals.

Respectfully submitted,

James S. Watson,
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Office Supreme Court, U. S.
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No. 302

In the Supreme Court of the United States

October Term, 1926.

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *NEE* TWIST, *Petitioners*,

VERSUS

PRAIRIE OIL & GAS COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PETITIONERS.

JAMES S. WATSON,
PAUL PINSON,
DANIEL HADEN LINEBAUGH,
Attorneys for Petitioners.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926

No. 302.

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *NEE* TWIST, *Petitioners,*

vs.

PRAIRIE OIL & GAS COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *of* PETITIONERS.

Statement of the Case.

Petitioners, owning an undivided six fifteenths interest in the lands of their deceased father, William G. Twist, sue to cancel certain "extension leases" executed during their minority to the Los Angeles-Cherokee Oil Company, and by it assigned to the respondent, Prairie Oil & Gas Company. The claim is for damages for continuing trespass, for cancellation of recorded leases as clouds upon title, injunction and quieting of title (Tr., p. 9).

The suit was instituted in the state court, and by virtue of the Oklahoma code, joined an action for damages as one cause of action, with the equitable claims referred to as a second cause of action.

The so-called "extension leases" were executed by the guardian in the course of certain proceedings appearing at pages 11-20 of the transcript. The original lease expired on September 28, 1919. Other "extension leases," including the one involved in No. 301, now before the court, were included in the same petition, and it was contended that the extension agreements (Tr., pp. 30-31) were secured by fraud, duress and false dealings (Tr., p. 6). Also that the proceedings were insufficient to authorize the court to approve such a sale in behalf of minors, by virtue of Probate Rule 9, promulgated by the Supreme Court of Oklahoma on June 11, 1914 (Tr., p. 6).

The respondent removed the case to the Federal Court on the ground of diversity of citizenship and caused it to be docketed as a case in equity. Respondent answered (Tr., p. 39) and prayed "that the court, by its decree, declare and determine that the defendant's title to said oil and gas lease, as modified and extended, is good, valid and subsisting as against the claim of the plaintiff, and that its title thereto be quieted as against said claims."

The facts upon which an accounting could be had, and all other facts necessary to a decision, except on the question of fraud and inadequacy of consideration, were stipulated (Tr., pp. 43-51). The parties and the trial court treated the case as one in equity, and the decree granted only equitable relief (Tr., pp. 41-42).

The Court of Appeals, when the matter was presented, held in its opinion (Tr., p. 94) in substance, that only the legal cause of action could be maintained in the Federal

Court, and that the equitable cause of action could not, since there was an adequate remedy at law, the plaintiffs being out of possession, and the defendant in possession, and that by reason of the fact that there was no waiver of jury, as provided by law, the court had no jurisdiction to review any question except those which arise on process, pleadings or judgment. The court refused to review the evidence and affirmed the judgments in favor of respondent on the ground that the pleadings were sufficient to support them.

ARGUMENT *and* AUTHORITIES.

If this was a suit in equity, then the appeal was the proper remedy, and the appellate court should have reviewed the evidence as well as the pleadings and the judgment. The relief sought by way of cancellation of leases, injunction against continuing trespass, and to quiet title, are all of an equitable nature.

Kellogg v. Schauble, 273 Fed. 1012;

Fay v. Hall, 249 Fed. 418 (8th Cir. Appls.);

Black, Recission and Cancellation, Vol 2, Sec 655;

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Bispham's Prin. of Eq. (8th ed.), Sec. 31;

Story, Equity Jur. (14th ed.), Vol. 2, Secs. 932 933;
9th Corpus Juris, p. 1160.

The remedy at law was in the plaintiff, for possession and to recover damages, but it was "not adequate, by no means as practical and efficient as a remedy in equity."

—*Chanslor Canfield Co. v. U. S., supra* (9th Circuit Court of Appeals).

If a court of equity has jurisdiction, it may also dispose of the legal title.

—*Chanslor Canfield Co. v. U. S., supra;*

Becker Franz Co. v. Shannon Co., supra (9th Circuit Court of Appeals);

Equity Rule 23.

Even if the remedy at law be deemed adequate, equity may proceed in the absence of objection. It is not a question of jurisdiction, but of procedure, which may be waived.

—Enc. U. S. Supreme Ct. Rep., Vol. 5, p. 826;

Peregoy v. Dodge, 163 U. S. 161, 41 L. ed. 113;

Ashland Waterworks Co. v. City of Ashland, 215 Fed. 492;

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Fay v. *Hill*, 249 Fed. 415, 8th C. C. A.;
Hansell v. *Purnell*, 1 Fed. (2nd) 266.

And the fact that an action for damages for trespass was included in the plaintiff's bill, does not oust equity of jurisdiction.

—*Becker Franz Co.* v. *Shannon Co.*, *supra*;
Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co.*, *supra*;
Chanslor Canfield Co. v. *U. S.*, *supra*.

The fact that there was an agreed statement of fact, as to every allegation except fraud and inadequacy of consideration, takes the case out of the rule as to trial of questions of fact without written waiver of jury.

—*Ford* v. *Grimmett*, 278 Fed. 140.

Quotations from various cases above cited appear in the brief appended to the petition for the writ.

Sections 274a and 274b of the Judicial Code, and Equity Rule 22, clearly contemplate that causes erroneously docketed shall be transferred by the trial court. In this case the appellate court substantially accomplished a transfer of a cause, treated by the trial court and by all parties as one in equity, to the law docket, and consequent dismissal. If transferred by the trial court, the right to amend the pleadings under section 274a is granted at any stage of the pleadings. But the cause must proceed and be determined upon such amended pleadings, and as no opportunity is afforded in the appellate court for amendment, this right has been denied us.

The defendant's answer, invoking equitable relief, changed the proceeding "from one at law to one in equity, with all the consequences flowing therefrom."

—*Liberty Oil Company* v. *Condon National Bank*, 67 L. ed. 232; 260 U. S. 234.

Prior to the enactment of Rule 22, a suit erroneously commenced on the equity side must be dismissed. And the decree of dismissal must expressly adjudge that it is rendered for that reason, "to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised."

—*Indian Land & Trust Co.* v. *Shoenfeldt*, 133 Fed. 484.

Unless the transfer may be accomplished only in the trial court, Rule 22 and sections 274a and 274b have complicated, rather than simplified, the practice. This is not the spirit of these enactments. They

> "manifest a purpose on the part of Congress to change from a suit at law to one in equity, and the reverse, with as little delay and as little insistence on form as possible, and are long steps toward code practice."
>
> —*Liberty Oil Company* v. *Condon Bank*, *supra*.

The opinion in that case is in accord with the decisions in:

Hansell v. *Parnell*, 1 Fed. (2nd) 266, 8th C. C. A.;

Pacific Coal & Transportation Co. v. *Pioneer Mining Co.* 295 Fed. 577, 9th C. C. A.;

Vidal v. *Co.*, 276 Fed. 856 7, 2nd C. C. A., syllabus;

Fay v. *Hill*, 249 Fed. 415, 8th C. C. A.

So much for the question of practice. If the court shall see fit to review the decisions of the trial court and of the 8th Circuit Court of Appeals, in the interest of expediency the case should also be determined on the merits.

—*Liberty Oil Co.* v. *Condon National Bank, supra.*

We, therefore, pass to a consideration of the merits of the case:

The petitioners, Cherokee Indian allottees, were wards of the United States and restricted during their minority.

—*Truskett* v. *Closser*, 236 U. S. 223.

The power to lease, on the date specified, was conferred by section 6 of the Act of May 27, 1908 (35 Stat. at L. 312), on the probate courts of the state. These courts became federal instrumentalities for the removal of this restriction but the procedure for leasing was to be prescribed by the state alone. The right to regulate procedure includes the power to enforce compliance, and implies jurisdiction to determine the effect of non-compliance.

Section 2, article 7, of the Oklahoma Constitution, is in part as follows:

> "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law."

By request of the Interior Department of the United States (see report, Commissioner Indian Affairs, 1914, pp. 50-55) the Supreme Court of Oklahoma promulgated cer-

tain rules for the control of the probate courts, Rule 9 being in these words:

> "No oil and gas or other mineral lease covering lands belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed at least five days before the same are sold, as provided herein, and notice of such sale must be given by posting and by publication, where publication is practicable, and shall be on ..... of each ....."

In October, 1915, the rules were construed by the Supreme Court of Oklahoma. They were said to be local statutes, of the same effect as if enacted by the legislature. It was held that the probate courts had no power or authority, that is to say, no jurisdiction, to ignore or dispense with these rules.

—*Freeling* v. *Kight*, 49 Okl. 202, 152 Pac. 362.

That decision had been rendered approximately eight months before the occurrence herein involved. Kight, county judge, was compelled by mandamus to observe the rules of which Rule 9 above is a part.

In *Ex parte Virginia*, 25 L. ed. 669-673, 100 U. S. 313, it is said:

> "It is well settled that the writ of mandamus will issue to correct the action of subordinate or inferior courts or judicial officers *where they have exceeded their jurisdiction*, and there is no other adequate remedy."

Also:

> "In what cases such a writ (mandamus) is warranted by the principles and usages of law, it is not always easy to determine. Its use has been very much extended in modern times and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that which they are in theory and by virtue of their office bound to do. *It does not lie to control judicial discretion*, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion and *outside the jurisdiction of the court* or officer to which or to whom the writ is addressed."

The rules, by this decision, are held to be, not directory, but mandatory. In other words, the probate courts of Oklahoma are without jurisdiction to dispense with these rules.

Following the *Knight* case, as we observed in our former brief, the Supreme Court of Oklahoma, in *Winona Oil Co. v. Barnes*, 83 Okl. 248, and *Carlisle* v. *National Oil Development Co.*, 83 Okl. 217, held that probate courts had no jurisdiction to order or confirm a transaction which was not in substantial compliance with Rule 9, requiring a sale in open court to the highest and best bidder, after public notice thereof; and that such confirmation and sale were absolutely void.

These decisions determine that the rule is a local statute, and that the court is without jurisdiction to disregard it.

The federal courts are bound by the local construction of state laws, especially when the interpretation antedates the transaction involved; and this is particularly true where

the jurisdiction of inferior state tribunals is the subject in question.

—*Kuhn* v. *Fairmount Coal Co.*, 215 U. S. 349;
St. L. & S. F. R. Co. v. *Quinette*, 251 Fed. 773;
Messenger v. *Anderson*, 225 U. S. 436;
Barnett v. *Kunkel*, 259 Fed. 394;
Commercial Bank v. *Buckingham*, 5 How. 317, 12 L. ed. 169;
Bulkham v. *Woodstock Iron Co.*, 154 U. S. 177;
Leffingwell v. *Warren*, 67 U. S. 599;
Standard Oil Co. v. *Missouri*, 224 U. S. 270;
Freeport Water Co. v. *Freeport*, 180 U. S. 587.

In a sense Rule 9 is a federal restriction upon the alienation of Indian land. The sovereign guardian of the petitioners procured its enactment by the state court. It was designed to prevent the existence of the situation here presented. It should therefore be so construed as to destroy the evil at which it was aimed. It is of no value unless its violation shall invoke a penalty. The penalty prescribed is not confiscatory, since the decisions require reimbursement for the expense of development.

—*Barnes* v. *Winona Oil Co.*, 83 Okl. 253, 200 Pac. 985.

Conveyances violating federal restrictions generally are held void, and this should furnish an additional reason for following the local decisions here.

—Act May 27, 1908, Sec. 5;
Truskett v. *Classer*, *supra*;
Heckman v. *U. S.*, 224 U. S. 413;
Goat v. *U. S.*, 224 U. S. 458.

If the Oklahoma decisions are to be followed, and if the court shall entertain our appeal, then the judgment should be reversed and judgment rendered in favor of petitioners, with instructions to the court to hear the matter further solely upon the question of accounting for oil and gas removed under the extension leases since the date of the trial in the court below.

If, however, the court shall hold that the Oklahoma decisions are inapplicable, nevertheless the extension leases should be cancelled by reason of the fact that they were obtained for a grossly inadequate consideration, in an irregular manner, and that they are tainted with fraud and unfair dealings.

Gross Inadequacy of Consideration.

The extension of lease here involved was one of a number executed by virtue of a petition (Tr., p. 15) and an order of the County Court of Tulsa County (Tr., p. 18) in consideration of the sum of $18,000.00 in cash, increase of the royalty from ten (10) per cent to twelve and one half (12½) per cent, and the drilling of a well on each of the tracts within six months from the date thereof, June 16, 1916. At that time oil was of the value of $1.35 per barrel (Tr., p. 47). On March 5, 1917, these leases were assigned to the Prairie Oil & Gas Company, they paying for the William G. Twist lease, $112,561.62; for the Albert Twist lease, $45,556.87; for the Jessie L. Twist lease, $43,870.39; and for the Edward C. Twist lease, $49,377.38, a total of $251,366.25. (Tr., p. 48.)

Of course, this amount includes not only the value of the "extensions" but the value of the original leases.

The court refused to permit us to prove the market value of the leases (Tr., p. 70), not only upon the ground that the witness offered was not qualified, but upon the ground that to show the market value was to "assail in this collateral proceeding the judgment of the County Court as to the sufficiency and adequacy of the consideration." (Tr., pp. 70-71.) This is equivalent to holding that gross inadequacy of consideration is immaterial as a matter of law. The court should have heard this evidence.

> "Even though objections to questions are sustained in equity cases, it is the court's duty to have them answered and included in the record so that if the appellate court finds that the chancellor erred the cause need not be remanded to have the testimony retaken."
>
> —*Uekle, et al.* v. *Wills, et al.*, 381 Fed. 29.

There is, however, sufficient evidence in the record to disclose the complete inadequacy of the consideration. At least we may determine the value placed upon the extensions by the respondent, the Prairie Oil & Gas Company, by deducting from the amount of $251,000.00 plus, paid by it, the value of the original leases during the remainder of their terms. The production is known, the value of oil is known, and the terms of the leases are fixed. The expenses of operation are established by agreement. Hence, it is a simple question of arithmetical computation to ascertain the net value of the leases during the remainder of their term.

When the petition was filed by the guardian in the Probate Court (Tr., p. 13), the William G. Twist average royalty was 8.53 barrels; the Albert T. Twist was 2.27 barrels, the Edward C. Twist was 2.45, and Jessie L. Twist, 3.95 barrels. This is 10% of the value of the crude oil produced (Tr., p. 13), being a total of 17.2 barrels. Hence, the lessee's production is 9 times the royalty, or 154.8 barrels on June 5, 1916. On March 5, 1917, when the Prairie took its assignment (Tr., p. 46) it had already, in February, 1917, paid the price mentioned and the daily production was at that time 104.81 barrels (Tr., p. 49).

The Los Angeles-Cherokee paid $18,000.00, an increase of $2\frac{1}{2}$ per cent in royalty, and the drilling of certain additional wells as a consideration for the "extensions." The Prairie paid them $251,000.00 plus, assumed the additional royalty and assumed the drilling of the additional wells. There was no development between the 16th day of June, 1916, and the 1st day of March, 1917, by the Los Angeles-Cherokee or any other person (Tr., p. 67).

The William G. Twist lease expired September 28, 1919, and hence, from March 5, 1917, had 936 days to run. The Albert T. Twist lease expired September 3, 1918, and had, therefore, 543 days to run; the Edward C. Twist lease expired March 21, 1920, and therefore had 1111 days to run; and the Jessie L. Twist expired March 21, 1920, having 533 days to run (Tr., p. 12). The production, as we have seen, had fallen off approximately one-third; that is, from 154 barrels to 104 barrels, between the date of the "exten

sion of the leases" and the date of the assignment of the "extension." The market value at the time of the purchase was $1.70 per barrel (Tr., p. 69). Take the William G. Twist lease, producing 8.53 barrels of royalty (Tr., p. 13), multiply this by 9, and we find the lessee's production is 76.77 barrels. Reducing this by one third, we find the production on March 5, 1917, to be 51.18 barrels. At a market price of $1.70 per barrel, this would yield $87.00 per day, to the lessee, or a total in 936 days of $81,432.00.

Applying the same method of computation to each of the other leases, we find a total expected or anticipated production during the remainder of their terms, gross, of $126,946.76. Averaging the expenses of operating over the entire period, as shown by the transcript, pages 46, 48 and 49, we find the daily expense on the William G. Twist lease to be $22.36; on the Albert T., $20.63; on the Edward C., $18.20; and on the Jessie L., $7.63. Multiplying in each instance by the number of days which the lease had yet to run, we find a total production expense of $56,418.04. This leaves a net profit, if the leases maintained their average output, as of the date of the purchase, during the remainder of their terms after the Prairie purchased the assignments, of $70,528.72.

We are giving the Prairie the benefit of the assumption that the leases would not depreciate in production during that period. This the court judicially knows is not true. They had decreased one third within the period of nine months. It appears that they had decreased to 65 barrels (Tr., p. 49), at the time of the trial, or about five years

after the assignment. However, we are content to assume that the Prairie, through its experienced officers, was able to predict that they would earn the full amount of the profit as shown above during the remainder of the terms of the leases, and that they were content to make no money on that portion of their purchase, but that they paid for the original leases every dollar which they could earn out of them, that is, $70,000.00. If the Prairie did so estimate, then they either made a tremendously bad bargain, or they deemed the market value of the "extensions" greater than the remaining amount paid; that is, approximately $180,000. We cannot assume that the purchaser was engaged in an altruistic enterprise.

We have suggested that the drilling of additional wells is no consideration. There is a duty of diligent development, regardless of contract, on producing oil property.

—*Strance v. Hicks*, 78 Okl. 1, 188 Pac. 347;

Pelham Petroleum Co. v. North, 78 Okl. 39, 188 Pac. 1049;

Indian Co. v. McCrary, 42 Okl. 136, 140 Pac. 610;

Blackwell Oil & Gas Co. v. Whitesides, 71 Okl. . . . , 174 Pac. 573;

Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

In spite of the refusal of the court to permit us to prove the adequacy of the consideration, we believe that our computation establishes that the respondent paid more than ten times as much for the extensions as the minors

received; and this within nine months of the date of the "extensions" and after the production had decreased approximately one third. We make no point of this decrease in production, except to say that it is off-set in some measure by the increase in the price of oil. If they paid ten times as much as the minors received, they can hardly be heard now to say that the consideration paid to the minors was not grossly inadequate.

Irregularity of Proceedings.

Even if the court should determine that the decisions of the Supreme Court of Oklahoma will not be followed as a rule of property and that the County Court had jurisdiction to proceed, we call attention to the following obvious irregularities in the sale proceedings which may be observed by reference to Exhibits "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L." (Tr. 302, pp. 10-34; Tr. 301, pp. 8-9.)

(a) In the petition, instead of asking for the right to sell a valuable property of the minors, the guardian sets out that she and the Los Angeles Cherokee Oil Company have entered into a tentative agreement which she desires the court to approve.

(b) The guardian appears not only as the guardian of one minor, dealing with one estate, but as the guardian of three minors, who own their own allotments, and who together with herself own the lands of William G. Twist, and also as the administratrix of Wm. G. Twist, deceased, a

proceeding contrary to the rule announced in *Jackson* v. *Carroll*, 207 Pac. 735 (Okla.).

(c) The petitioner seeks to have the agreed sum of money to be paid for the leases pro rated according to the average royalty on the different tracts. This arrangement does not take into consideration the number of wells on each tract, the age and condition of each well, the extent of undeveloped acreage of *each* tract, nor the time of termination of the original leases. Each of these items was an important factor in determining the value of the extension sold. The Wm. G. Twist lease contained more than 80 acres and expired September 28, 1919; the Albert Twist lease contained 30 acres, and expired September 3, 1918; the Edward C. Twist contained 30 acres, and expired March 21, 1920; the Jessie L. Twist lease contained 80 acres, and expired December 7, 1918. It is obvious that the mere average current royalty could not determine the value of the various extensions respectively, and that this was but an arbitrary agreement, without regard to value.

(d) The prayer is that the guardian be "permitted to enter into an agreement extending the term," obviously with the Los Angeles Cherokee Oil Company.

(e) The court, in its "order setting date of hearing petition for sale of extension of leases," mentions "the petition praying leave of the court to extend the lease" and orders that the petition be set for hearing on the 10th day of June, 1916, at 10:30 o'clock a. m. — not that the extensions be then sold.

(f) There was no order of sale.

(g) The notice was not published, but posted in three public places, "publication being not practicable."

(h) On the 16th day of June, Mrs. Welty, as the guardian and as the administratrix, files report and return on sale of extension of oil and gas mining leases, to the Los Angeles Cherokee Oil Company. In this report she says (Tr. #302, pp. 15-17), that she has executed and delivered certain oil and gas mining leases to the Los Angeles Cherokee Oil Company "in accordance with the prior order of this court setting date for hearing of her petition for sale of said oil and gas lease." The cash bonus, it is said, is to be pro rated according to certain agreements already entered into between the guardian and the Los Angeles Cherokee Oil Company.

(i) The order of court refers to the fact that the guardian filed a petition "praying for the extension of the term of certain oil and gas leases," and finds that "due and proper notice of said *hearing* has been given." The court was of the same view as we are, that there had been no notice of *sale*, but notice of *hearing* of petition. The court also finds that oil and gas leases had been executed and that the guardian is satisfied that the proposition is beneficial and should be approved, and that the guardian should enter into the agreement extending the terms of the leases. Immediately the court recites that it has examined the agreements and approves and confirms the same.

(j) The "notice of sale," so-called (Tr. p. 33), purports to give notice that in pursuance of an order of the County Court, sale would be had at 10:30 a. m., on the 16th day of June, 1916, in the County Court room in Tulsa "*at which time and at said place any person may appear to contest the sale of such extensions or show cause why such lease or leases should not be extended* from the date of the expiration of the present leases * * * and if any objections there be same to be filed in writing at the same time and place." If notice of sale in proper terms had been given, the guardian had no authority to give it, because the court had not yet heard the petition, nor had the court directed that a sale be had. The court did not sign the notice of sale. That was a function assumed by the guardian and administratrix. The court had not authorized a sale, and therefore had not authorized a notice of sale. The court had merely made an order setting a date upon which the petition would be heard. (Tr. ¶302, pp. 14-15.) The guardian had no authority, upon this character of order, to advise the public that a sale would be had upon that date. We suggest that it is obvious no contemplating purchaser would be present on that day. The only persons who would be attracted by such a notice would be those who desired to present an objection to the order of sale. In other words, persons who not only did not desire to purchase, but who desired to prevent others from purchasing. The cases of *Clayton* v. *Iddens*, 298 Fed. 18; *Jackson* v. *Gates Oil Company*, 297 Fed. 549, and *Duff* v. *Keaton*, 124 Pac. 291, all dealt with sales of leases prior to the adoption of Rule 9 of the Supreme Court; there was, nevertheless, an order of sale;

after which the guardian made a return of sale, pursuant to the order, stating that she had secured the best purchaser and the highest price obtainable, and the court then approved and confirmed the lease. In each of those there was a compliance, as held by the court in *Duff* v. *Keaton*, with the procedure prescribed for the sale of personal property within the State of Oklahoma. The present case discloses no effort to comply with any of the customs or forms commonly observed in such cases.

If the court had jurisdiction, nevertheless the proceeding was at best decidedly irregular.

Fraud.

The evidence with relation to fraud appears in the transcript, on pages 52 to 63, inclusive. It discloses that the guardian of the minors was a widow, in poor health. Pitt and Anderson (doubtless the same persons who represented the Los Angeles Cherokee Oil Company in their negotiations with the Prairie for the sale of the leases (Tr., p. 62)) urged upon her the expediency of executing an extension, so that the lease should continue as a perpetual right in the land. They became her bondsmen in the guardianship. They stated positively to her that the sum of $10,000.00 was more than the extensions were worth. They informed her that she was not doing right by her wards if she did not accept this sum. They intimated that the County Court would not look with favor upon her refusal to execute these agreements. They advised that the eyes of other persons were upon the guardianship, expecting her to

fear that the court would remove her and place the affairs of her children in strangers' hands. We were not permitted to show what representations were made to her son and communicated to her, although we endeavored to prove those representations (Tr., pp. 64-65). The petitions were prepared by the Los Angeles-Cherokee Oil Company's attorney, Mr. Pitt stating that he did not think it was necessary for her to have an attorney (Tr., p. 63). There was no person present the day of the purported sale except Rice or Lyon, one of the attorneys for the company; Mr. Pitt, the company's agent; and the guardian.

We have before discussed the inadequacy of consideration, and in that connection, have disclosed the fact that the value of the extensions, as estimated by the Prairie for the purpose of purchase, and as actually paid for in cash, was approximately $180,000.00. Positive statements were made by the agents of the Los Angeles-Cherokee Company to the effect that $18,000.00 was more than they were worth (Tr., p. 58). We must assume that the verified petition of the guardian was induced by this positive statement, and that her actions were influenced thereby. The men making it must have had a knowledge of the falsity of the statements which they made. They were in a position to know the value of the leases; the mother is not shown to have had such knowledge; and she acted without the aid of counsel, upon the suggestion of parties adversely interested.

"Representations as to value, deliberately incorrect, and fraudulently made, are actionable."

—*Lumber Co.* v. *Ott*, 142 U. S. 622, 35 L. ed. 1136;
Hood v. *Wood*, 61 Okl. 294, 161 Pac. 210;
Werline v. *Aldred*, 57 Okl. 391, 157 Pac. 305;
Dalton v. *Hooper* (Okl.), 177 Pac. 571.

The Prairie Oil & Gas Company pleaded it was a bona fide purchaser. That, however, "is an affirmative claim and must be proven by the party who seeks its benefit."

—*Barnett* v. *Kunkel* (8th C. C. A.), 259 Fed. 394;
Wright Blodgett Co. v. *U. S.*, 236 U. S. 397, 59 L. ed. 637.

There was no evidence offered to support this plea except the agreement that Dana H. Kelsey would testify, if present, that he acted for the Prairie in the purchase, in connection with Fred S. Cook, and that Mr. Kelsey would testify that he knew nothing of the transactions between the guardian and the Los Angeles Cherokee Oil Company, and that Anderson and Pitt did not inform him, at the time of the examination of the abstracts, of the matters, conversations or transactions between the Los Angeles Cherokee Oil Company and the guardian. Fred S. Cook is absent without explanation. There is no evidence in the record that he was unaware of the nature of the transactions, or of the conversations between Pitt and Anderson, on the one hand, and the guardian on the other.

Moreover, the known facts are sufficient notice that some improper activities had existed. The Prairie knew that it was buying for approximately $180,000.00 property

which had depreciated in value and which had been purchased for $18,000.00 within seven or eight months before. Bear in mind that no additional development or improvement had occurred. The Prairie knew that the probate rules of the Supreme Court had not been complied with, in that there was no competitive bidding, no order of sale, and no proper notice of sale. In the presence of the glaring irregularities, and with positive knowledge of the vast discrepancy in the prices paid, a purchaser cannot contend that he is in the exercise of good faith. He has shut his eyes to obvious facts and closed his ears against information.

We contend, moreover, that there is fraud on the face of the entire proceedings.

One must be impressed with the view that it was fraudulent to insert in the agreement the fact that the drilling of an additional well, within six months, was a part of the consideration. This was no consideration. It was but the agreement to do that which they were already bound to do. The increase in royalty was but another subterfuge and pretended consideration. For the leases under which the Los Angeles-Cherokee claimed were governed by the regulations of the Department of the Interior, being leases upon minor Indian land. Under the regulations of April 20, 1908, section 15A: "The minimum rate of royalty on oil on and after May 1, 1908, shall be 12½ per cent of the gross proceeds of the oil produced from said leased premises." Whether this condition could have been enforced against the lessee or not, the regulation serves to indicate that any changed or extended lease which might

come within the jurisdiction of the Department of the Interior would have contained the 12½ per cent royalty provision. That this is the customary royalty will not be denied. Moreover, it was but a trifling consideration at best that the royalty be increased 2½% during the remaining short term of the leases. What the royalty was to be after the leases expired is immaterial.

The face of the notice itself is so ambiguous that it must be construed as fraudulent. It was not the intention of the parties that a public sale should be had; the whole arrangement was a private agreement; the only order of the court prior to the sale was the order that the petition should be heard; and the petition was for leave to execute the extension agreement to the Los Angeles-Cherokee Oil Company. The price, terms and conditions had all been agreed upon. The agreements were executed privately. There was no hearing had, as provided by the order of the court; the notice purported only to give to those interested an opportunity to object to the granting of the petition; that is to say, to object to the granting of the extension to the Los Angeles-Cherokee Oil Company; not to give to purchasers an opportunity to bid.

In the nature of things an extension of the old lease could only be made to the person who then owned it. A stranger could not bid upon the extension of a lease owned by some one else. In order to be absolutely fair to the minors, it perhaps would have been necessary for a new lease to be sold, effective upon the expiration of the old, on each tract. But the face of the notice itself, the method of

conducting the sale, and the obvious irregularities, impress us with the view that the proceeding was deliberately designed to secure the property without the presence of any other bidders, and to conceal from the public at large the nature of the proceeding to be had on June 16, 1916; while, in a measure, appearing to comply with the laws of the state.

Conceding the gross inadequacy of consideration, the irregularities in the sale, and the fraud and unfair dealings, the case of *Schroeder* v. *Young*, 161 U. S. 334, 40 L. ed. 721, is peculiarly applicable. In that case, as in the case at bar, a judicial sale was the subject of controversy. The sale had been confirmed and a suit in equity brought to set aside the sale. The property had been sold for a little more than $1700.00, while the trial court found it to be worth $26,000.00. The court, referring to the argument that the proceedings were irregular, observed in the language of Mr. Justice Bradley, in *Graffam* v. *Burgess*, 117 U. S. 180, 29 L. ed. 839:

> "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed the greater the fraud intended the more particular the parties to it often are to proceed according to the strictest forms of law."

In the opinion by Mr. Justice Brown, it is said:

> "Plaintiff relied mainly for a decree in this case upon the fact that his interest in the property in question, which the trial court found to be worth $26,000.00, was sacrificed at these several judicial sales to pay a judgment of little more than $1700.00."

It will thus be seen that the principal allegation was the inadequacy of consideration. It was this fundamentally upon which the court of equity seized; it is upon the fact that a wrong has been done that equity bases the vigilant exercise of all of its powers, to protect the wronged.

The court in this case, however, proceeded to find certain irregularities, none of which amounted to a fatal defect, but among which are recited the following:

(a) The property was sold to Stephens and Schroeder, who had acted as attorneys for the judgment creditor throughout the entire transaction. Compare this to the instant case, where the guardian was not represented by counsel, but the attorneys for the purchasing company carried the entire transaction through the courts.

(b) "At neither of the sales was there any other bidder and no other person present than Stephens and the officer conducting the sales, and we can readily appreciate how inevitable it was that the property should be sacrificed." In that case, however, there was an opportunity for other bidders to appear. In the present case there was not only no other bidder present; there was no opportunity given to bidders to be present. The only right which the County Court granted by its order was the right to appear and show cause why an order of sale should not be made.

(c) Another reason was that there was an irregularity with regard to the amount of the levy on one execution. Compare this with the irregularities in the sale before the court, *viz.*, the failure to observe Rule 9, the bulk sale, the order to lease to a particular lessee for a specified price.

These are the chief irregularities which the court considered in that case, and of them, taken with the gross inadequacy of consideration, it is said:

> ***"It would be a reproach to a court of equity if it could not lay hold of such a transaction as this is shown to be and set aside a sale of property acquired under the forms of law, and in defiance of natural justice."***

How much more reasonable to set aside the transaction had with helpless minors; not only "in defiance of natural justice," but in defiance of the rules of procedure prescribed by two sovereign governments for the protection of the particular class of persons here affected. Can there be any doubt of inadequacy of consideration here? If so, the court should have permitted us to prove its inadequacy. In that direction we were not permitted to proceed.

In *Wheeler & Motter Mercantile Co.* v. *Wright*, 64 Okl. 97, 166 Pac. 184, the Supreme Court of Oklahoma said in part:

> "A judgment sale will not be set aside for mere inadequacy of price unless it is so great as to shock the conscience. A sale may be set aside for gross inadequacy of price, if accompanied by circumstances showing unfairness in the conduct of the successful bidder, or any circumstances sufficient to raise a presumption of fraud" (syllabus, paragraph 1).

Again, in *Schroeder* v. *Young*, *supra*, the court says:

> "While mere inadequacy of price has rarely been held sufficient itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances, impeaching the fairness of the transaction, as a cause for vacating it, especially if the inade-

quacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as *if several lots have been sold in bulk where they should have been sold separately*, or sold in such manner that their full value could not be realized; *if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security;* or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price—the sale may be set aside, and the owner may be permitted to redeem."

We call particular attention to the reference to the sale in bulk as grounds for setting aside a judicial sale.

This is a judicial sale. Hence the importance of the decision of the Supreme Court of Oklahoma in *Jackson* v. *Carroll*, 86 Oklahoma 230. There the fact that a sale of separate interests was sold in bulk was made the basis of a successful collateral attack upon the judgment of the County Court. The facts were similar to the sale in the case at bar. This recognition of the doctrine by the Supreme Court of the United States, coupled with the express decision of the Supreme Court of Oklahoma, should be sufficient in our judgment to warrant this court in reversing upon the sole ground that the interest of each of three minors in his own allotment was sold jointly with the interests of those three and two others in the allotment of the deceased father, all at a bulk price, for one consideration, without determining the value of each one, except by an arrangement suitable to the purchaser himself, and without the court's passing upon the proper valuation to be given to each interest.

In other words, we have here, for the benefit of the purchaser alone, a lump sum sale of eight different individual properties; namely, three individual allotments and the separate interests of five different persons in a fourth allotment, all for the gross sum of $18,000.00 and a certain advance in royalty.

We believe the rule in these cases is salutary, and justifies our position here. It is a complete answer to the contention which will doubtless be made, that the question of value was directly determined by the probate court, and that its judgment that the price is adequate is sufficient.

Moreover, there is a clear distinction between proceedings *ex parte* and proceedings adversary, when we consider the force and effect of the judgments rendered, and the character of proceedings necessary, to overthrow such judgments. In an adversary proceeding, fraud or perjured testimony is not sufficient to overthrow the judgment. The fraud must be extrinsic to the proceedings, because the court passes upon the question of the evidence with both parties before it, and determines whether there had been perjury committed. This, however, was an *ex parte* proceeding. A guardian represented herself and the minors' interests. She made the petition. It was not contested, and her petition was furthered and fostered by those persons adversely interested. There was no evidence submitted. In such a proceeding fraud or false testimony vitiates the entire proceeding. Compare, *United States* v. *Minor*, 114 U. S. 233, with *United States* v. *Throckmorton*, 98 U. S. 61.

The fraud here was both extrinsic and intrinsic.

Moreover, the irregularities are apparent on the face of the record. Coupled with inadequacy of consideration, they are sufficient grounds for equity to interfere. And they are sufficiently obvious to prevent the defense of bona fides by the respondent.

We respectfully urge therefore:

(1) That the decision of the Eighth Circuit Court of Appeals be reversed, as well as that of the trial court; and,

(2) If the court shall hold the Oklahoma decisions applicable, then that this court render such judgment as should be rendered upon the record, declaring the leases void and remanding for an accounting; and

(3) If said "extension leases" shall be held voidable only, then that this cause be remanded for new trial; or

(4) That the court render such other and further order as shall protect the interests of the petitioners herein and restore them to the rights which they have lost by reason of the judgments of the District Court and of the Circuit Court of Appeals.

Respectfully submitted,

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No. 301

In the Supreme Court of the United States

October Term, 1926.

Edward C. TWIST, *Petitioner*,

VERSUS

THE PRAIRIE OIL & GAS COMPANY, *Respondent*.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

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III. Failure to comply with said Rule 9 in obtaining the lease extensions was not a jurisdictional defect, as the Probate Rules referred to were rules of pro-

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cedure merely, not affecting the constitutional and statutory authority of the probate courts of Oklahoma in respect to the transactions involved, and were ineffective to render void for non-compliance therewith the judgment of such court acting within its jurisdiction in respect to a completed transaction wherein the rules of procedure were not invoked by either of the interested parties, and were thereby waived. 22

IV. *(a)* The proof fails to show fraud in procuring the order and judgment of the County Court or to substantiate the allegations of fraud and unfair dealing in respect to the modification of the lease contract. *(b)* The fraud claimed is, if fraud at all, extrinsic fraud, and the judgment and order of the probate court is conclusive in this proceeding. . . . 57

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1926.

No. 301

Edward [redacted] C. TWIST, *Petitioner,*

vs.

THE PRAIRIE OIL & GAS COMPANY, *Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* RESPONDENT.

The decision of the Circuit Court of Appeals that the remedy of the petitioners at law was adequate, and that a court of equity would not, under the facts pleaded, grant the equitable relief prayed for, should be upheld.

The view taken by the Circuit Court of Appeals, briefly stated, is that the petitioners' cause of action is predicated upon the proposition that the leases under which respondent took possession of the lands were ended, and that it was a trespasser, the contract and stipulation extending the term of the leases being void and ineffective for that purpose; that the remedy at law which they had invoked

was adequate; that a federal court could not grant the relief of quieting title as prayed for because petitioners were not in possession and the respondent was in possession of the land; that the decree of the court was in effect a judgment at law, upon the issues involved, in favor of respondent, and that though brought to the appellate court by appeal, that court would treat it as if upon writ of error and would decide accordingly, but only upon the issues arising under the process, pleading and judgment, the trial being to the court without a jury, but without an express waiver thereof.

The authorities cited by the court seem ample to sustain its conclusions, and are not answered, we submit, by statements that the relief prayed for is equitable in its nature, and that a court of equity may dispose of the whole case and grant complete relief even if such relief be of the kind conferred by a court of law.

The petitioners' first cause of action was predicated on their ownership of land. They allege the execution of an oil and gas lease, which had expired at the time of the institution of the suit, and that the respondent was taking oil and gas from the land, and which is equivalent to an allegation that it was in possession.

—*Cosmos Exploration Co.* v. *Grey Eagle Oil Co.*, 112 Fed. 4.

Petitioners were claiming the legal title on the ground that the attempted extension of the term of such leases was void. In such a case the remedy is at law.

—*Hart* v. *Hollingsworth*, 100 U. S. 100;
United States v. *Wilson*, 118 U. S. 86.

The so-called second cause of action merely reiterates the allegations of the first, no new facts being set up, but upon the same facts petitioners pray that their title be quieted.

The action of the petitioners, as disclosed by the pleadings, is really one of trespass for the wrongful removal and conversion of oil and gas from the land, as the recovery of a money judgment by way of damages is sought, and there being no question of respondent's financial responsibility, the remedy at law is adequate, and equity will not entertain the case notwithstanding averments of fraud in the petition.

—*United States* v. *Bitter Root Development Co.*, 200 U. S. 451.

It is pointed out that the relief of cancellation of the contract extending the term of the leases was asked, and that the granting of this relief is not dependent on possession. It is apparent, however, this is merely a method of quieting title, for the suit is not predicated on rescission of the contract with the right to have same made effective, as a matter of record, by decree. Had the suit been of that character, petitioners would have been required to restore, or offer to restore, the consideration admittedly received under the contract. This, we understand, is the universal rule in equity, and is the requirement of the Oklahoma statute. (Sec. 5079, Laws 1921.) No such offer was made in the pleadings or proof, and attention is called to this omission for the purpose of emphasizing the view of the Circuit Court of Appeals that the suit was one to quiet title and not one predicated on rescission and cancellation. Furthermore, the petitioners asked for damages against a defendant presumably solvent, and were not entitled to the rem-

edy of cancellation without showing how they would sustain future injury by not having the contract of extension cancelled, or how the same, unless cancelled, would be a menace to the petitioners, or that there was danger that it would be used, tortiously or oppressively by the respondent to their injury; in other words, without showing how the remedy at law, which they had invoked, was not adequate. The judgment for damages would have been adequate, and moreover would have been conclusive of the rights of the parties, and could be pleaded as an adjudication against any claim of the respondent under the extended leases.

It is pointed out that respondent invoked equitable relief and is thereby concluded on the question under discussion. The answer of respondent called attention to the judicial proceedings resulting in the contract of extension of the term of the leases and its approval by the court as shown by the petition and its exhibits, and denied that the same were ineffective to extend the terms of the leases as charged in the petition. It admitted respondent's possession of the land, and that it was taking oil and gas therefrom, denied the charge of fraud, and set up that it was a bona fide purchaser of the extended leases, and asked that its title thereto be quieted. Are sections 274 A and 274 B of the Judicial Code applicable to that situation as claimed? Section 274 A relates only to the power of a court to order an amendment of the pleadings if the parties see fit so to do, in order that the same might be proceeded with on the proper side of the docket. *Waldo* v. *Wilson*, 231 Fed. 654. The fact that the cause here was proceeded with on the equity side and that the judgment was in the form of a decree is not conclusive, for the court found all the issues for the respondent, and its real judgment was that respondent was

the owner of oil and gas leases upon the lands involved (see decree). (*Ewert* v. *Robinson*, 289 Fed. 740.) Such a judgment would be equivalent to quieting respondent's title, and the mere fact that such relief was granted on its request did not operate to convert the action into a suit in equity.

Section 274 B merely permits equitable defenses in an action at law. *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, is cited in support of the claim that the respondent's answer made the case an equitable one. There, however, the cause of action was at law for money had and received. Defendant admitted its liability for the money, but averred that it held the same as a stake-holder, and that others, besides the plaintiff, were claiming it, and therefore offered to pay it into court and prayed that the other claimants be made parties so that the question of ownership might be litigated as between them. The answer of the defendant set up an entirely different set of facts, which changed the issues so that the proceeding thereby became an equitable one, an interpleader under section 274 B. Surely that could not have been the result of respondent's answer in the instant case unless it had admitted the allegations of the petition and that the sole issue in the trial had been upon its plea of bona fide purchase. We take it that the equitable defenses referred to in section 274 B relate to equitable *remedies*, such as reformation, cancellation, etc., which were always available to a defendant against whom there exists an admitted legal liability. The word defense is the significant word signifying something which simply defeats recovery in an action or suit and not something by means of which the defendant can have independent relief. Pomeroy's Code Remedies, paragraph 27.

The conclusion of the Circuit Court of Appeals that the primary relief was at law and furnished an adequate remedy—the equitable relief demanded being incidental only, *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25—and that it was immaterial that the real judgment was, by common consent, in the form of a decree, appears to be sound in principle. It is not a question of waiver or failure to object to the procedure; it is a question of whether the petitioners have the right to insist that the primary and principal relief demanded by them was equitable and that they were entitled to such relief upon the face of their petition. The construction of that petition by the Circuit Court of Appeals puts the petitioners in the attitude of asking the trial court to adjudge and determine whether the respondent was a trespasser and was wrongfully removing oil from their lands, and if so, to award them damages for such wrongful conversion, and, as an incident to such recovery, declare by a decree the invalidity of the lease extensions. The petitioners are insisting, however, that the allegations of fraud and non compliance with Rule 9 made the main cause one for equitable relief, with damages as an incident. The authorities would appear to sustain the view of the Circuit Court.

On the merits the two propositions advanced by petitioners are:

First. That the extension of the term of the leases on June 16, 1916, was not made in accordance with the provisions of Rule 9 of the probate rules promulgated by the justices of the Supreme Court of Oklahoma, and that therefore the probate court in approving such extensions acted without jurisdiction.

Second. That the extension was obtained by fraud

and unfair dealings and for a grossly inadequate consideration.

Under the first proposition there is presented a question of public interest, *viz:* whether the highest court of a state, or the judges composing that court, may, under statutory authority to make general rules to carry out the provisions of the state code, prescribe a rule regulating the procedure of inferior courts of general jurisdiction so as to nullify their judgments in respect to matters within such jurisdiction because of non-compliance with a rule so prescribed, and whether this court is bound by the decision of the state Supreme Court that the judgment of such inferior court rendered without an observance of the rule is void for want of jurisdiction and retroactive in its effect.

On the merits of the case as a whole it is the position of the respondent:

1. The requirements of Rule 9 of the Probate Rules promulgated by the Justices of the Supreme Court of Oklahoma, were substantially complied with in respect to obtaining the extension of the term of the mining lease involved.

2. (a) *Carlile* v. *National Oil & Development Company* and *Winona Oil Company* v. *Barnes*, decided by the Supreme Court of Oklahoma, are ineffective to deprive the respondent of its vested rights acquired at a time when there was no decision on the point as to the effect of such rules upon the jurisdiction of probate courts, and this court has the right to determine for itself the effect of a violation of such rules.

(b) The order and judgment of the probate court approving the transactions involved, made in the exercise of

a jurisdiction recognized by the state Supreme Court in its prior decisions, was valid, and under the rule of such decisions a right of property vested in the respondent by its contract of purchase of the extended leases herein involved.

3. Failure to comply with said Rule 9 in obtaining the lease extensions was not a jurisdictional defect, as the Probate Rules referred to were rules of procedure merely, not affecting the constitutional and statutory authority of the probate courts of Oklahoma in respect to the transactions involved, and were ineffective to render void for non-compliance therewith the judgment of such court acting within its jurisdiction in respect to a completed transaction wherein the rules of procedure were not invoked by either of the interested parties, and were thereby waived.

4. (a) The proof fails to show fraud in procuring the order and judgment of the County Court or to substantiate the allegations of fraud and unfair dealing in respect to the modification of the lease contracts.

(b) The fraud claimed is, if fraud at all, extrinsic fraud, and the judgment and order of the probate court is conclusive in this proceeding.

5. The Prairie Oil & Gas Company is a bona fide purchaser for value and without notice of the alleged fraud.

I

Before discussing the questions of law involved in the petitioner's first proposition we desire to call the court's attention to the proceedings in the probate court resulting in the order and judgment herein assailed, and from which, we think, the conclusion may fairly be drawn that the re-

quirements of the rule referred to were observed so far as they could apply to a transaction not within the express terms of the rule itself. That rule provides that no oil and gas lease covering the lands of infants under guardianship will be approved "except after sale in open court to the highest and best responsible bidder," and that "notice of such sale must be given by posting and by publication, where publication is practicable."

The record shows that notice was given; that Mrs. Weldy, as guardian of her minor children, and as administratrix of the estate of William G. Twist, deceased, gave notice that she would "sell at public sale to the highest bidder, subject to confirmation of said court, on Friday, the 16th day of June, 1916, at 10:30 o'clock A. M., in the County Court room in the City of Tulsa, Oklahoma, an extension of oil and gas mining lease now covering the following described tracts of land in Tulsa County, State of Oklahoma, to wit:" (Describing the tracts of land covered by the four leases.) (R. 26.) This notice was posted on June 5, 1916, in three public places in Tulsa County (R. 28), which was in compliance with the order of the County Court (R. 12). On June 16, 1916, the guardian and administratrix made a sworn report that she had executed to the Los Angeles-Cherokee Oil Company an extension of the terms of the four leases "for a period from the date of the expiration of each of said present leases for so long as oil and gas should be produced" and for a total cash bonus of $18,000.00, and increase in the amount of royalty from ten per cent to twelve and one half per cent of the oil produced and saved from the premises (R. 13-14). On the same day the court made an order reciting that it had heard the petition, witnesses, and statement of counsel, and reciting the

consideration for the extension to be "the sum of $18,000.00 in cash, and an increase of the royalty on each lease from ten (10%) per cent to twelve and one-half (12½%) per cent, effective forthwith, and the drilling of a well on each of said tracts within six months from this date," and finding "that said proposition is beneficial and for the best interests of said minors and that the same should be approved." The approval is in the following language:

> "It is further considered, ordered and adjudged that the court having examined said agreements extending the terms of said leases, does hereby approve and confirm the same, and does approve and confirm the extension of said leases for a term so long as oil or gas shall be found thereon." (R. 15-16.)

There is nothing to indicate, and Mrs. Weldy offered no evidence, that anyone had made a better offer than the Los Angeles Cherokee Oil Company had made her. It was therefore the highest and best bidder in the absence of any proof that other persons offered or made a better or higher bid.

Counsel for petitioners have not pointed out wherein the proceedings failed to comply with the requirements of Rule 9, except to urge certain "irregularities," which, in effect, are that the proceedings related merely to the approval of an agreement which the guardian had made with the Los Angeles Cherokee Oil Company—the lessee under the existing leases—and not to a sale of an extension of the terms of such leases. If Rule 9 applied to the situation at all, the court must be impressed with the difficulty of applying it to the case of a proposed extension of the term of an existing lease. This difficulty was recognized by the Supreme Court of Oklahoma in the two cases cited by petitioners in

support of their contention that the extension of the terms of these leases was void (*Winona Oil Co.* v. *Barnes; Carlile* v. *National Oil & Development Co.*). In the *Carlile* case it was said:

> "The defendant in error suggests in their brief that it would be a vain and useless thing for the court to put up at public auction, during the term of a lease, the question of the extension and modification of the old lease, for the reason that no one would bid on such an interest but the old lessee, due to the interest of the old lessee still subsisting."

And in reply to that contention the court said:

> "The trouble with such a contention is that it involves a suggestion of a reason why a court, in the exercise of its discretion, and with due regard to the interests of the ward, should not make an order allowing a sale or an extension under such conditions, but if, in any case, the County Court, in his discretion, concluded it was the best interests of the minor that it be done, there is no reason why there could not be at least *a reasonable compliance with the procedure laid down in Rule No. 9. It might result in a vain thing and result in the same thing as has resulted in the instant case. But it would result in a sale, judicial in its nature, and the rights of the minor would at least be protected by an opportunity for open and public bidding, and the purposes of the law satisfied.*"

The extension of the lease in that case was made without notice of any kind, and it was admitted that the result might have been no different even if public notice *had* been given, but that in such event the rule would have been obeyed and the court would then have been powerless to strike down the result of obedience to its own mandate or

the mandate of the judges composing the court, who, as such, promulgated the rule.

In *Harrell* v. *Prairie Oil & Gas Co.*, 8 Fed. (2d) 236, the question of the extension of an existing lease at a time when Rule 9 was in force, was involved. The requirements of the rule as to publication, etc., were complied with, and the lessee was the purchaser at the sale. It was contended that the probate proceedings were ineffective to extend the lease because, among other things, they

> "failed to state, either in the petition of the guardian to sell the new lease, or in the order authorizing its sale, or in the notice of sale, whether the proposed lease would take effect immediately upon its approval by the court or at the end of the term of the then existing lease; that the purpose of the sale and lease would be a cloud upon the title of any bidder other than appellee, and the lease to anyone else would not become effective until the expiration of the old lease, thus preventing competitive bidding; that the proceedings were fraudulent in that the notice of the proposed giving of the new lease did not state that the lands then had producing wells thereon."

The argument, however, did not prevail. The court said:

> "There is no statute of the state regulating the procedure in the sale of an oil lease on a ward's lands, but in 1914 the Supreme Court adopted a rule governing the procedure which has been adjudged controlling (*Carlile* v. *National Oil & Development Company*, 83 Okl. 217, 201 Pac. 377), wherein it is provided that such leases must be sold in open court to the highest and best responsible bidder, that petitions for the approval of such leases shall be filed at least five days before the same are to be sold, and that notice of such sale must be given by posting and publication where publi-

cation is practicable. All of these requirements were complied with."

The proceeding in the instant case was an honest and painstaking effort on the part of the probate court to comply with the rule and also to accommodate the notice to the actual facts and circumstances. To have given notice of a sale of a lease would have been misleading. Prospective bidders would not know from such notice that the leases advertised were existing leases, completely equipped and producing oil. Furthermore, a bidder would have to contemplate the dismantling of the leases of their equipment by the Los Angeles Cherokee Oil Company at the end of the prescribed term, for, of course, it was not obligated to sell that equipment. Prospective bidders were therefore informed by the notice that it was the extension of existing leases which was to be sold. The court wanted to be advised, of course, as to the expediency of extending the term or permitting the leases to expire with all the consequences which might result from dismantling them of their operating equipment at that time, and consequently gave notice that it would hear any objection as to why the leases should not be extended. To urge that a private arrangement or contract between the lessee and the guardian and administratrix had already been made, is beside the point. That agreement had no validity unless the court approved it. If anyone had appeared pursuant to the notice and had offered a better arrangement than the proposition of an extension of the existing leases, or had made a better offer for such extension, all of which was the object of giving the notice, and of which there would have been no necessity except for the rule, the court, we must assume, and in accordance with its duty to protect the interests of the

ward, would have adopted it. It has never been the opinion of the writer that the rule applied to the extension of the term of an existing lease, a matter involving merely the modification of the original lease, which is not a sale, but a contract for the use, of property. (*Papoose Oil Co.* v. *Swindler*, 221 Pac. 507.) In the very nature of things the proceedings to obtain the extension could only be a compromise between the actuality and the rule required to be observed. The question of modifying the original contracts was addressed to the discretion of the probate court which has jurisdiction over a minor ward and his estate until he arrives at majority.

—*Ozark Oil Co.* v. *Berryhill*, 143 Pac. 173.

That view has support in *Ardizzone* v. *Archer*, 160 Pac. 446, which, by clear inference, holds that the modification of an oil and gas lease, with the consent of the probate court, is binding. There was in the instant case a formal compliance with the rule as to notice. The fact that there was no "publication" of the notice in addition to its being posted in three public places, is immaterial. Rule 18 of the same rules provides:

> "All advertisements not required by law may be waived with the consent of the County Court upon the approval of the probate attorney or tribal attorney."
>
> —171 Pac., page IX.

The objection that there was no "sale" of the extensions because the probate court did not in terms authorize or direct the sale, is not well taken. The notice given under the rule was specific, namely, that the guardian would "sell at public sale to the highest bidder * * * an extension of an oil and gas mining lease," and the subsequent approval

by the court of the execution of the extended leases to the lessee for the consideration offered by it can amount to nothing else but a sale within the meaning of the rule. We think there can be no doubt, therefore, that the provisions of Rule 9 were complied with, and if so, further discussion of the petitioner's first proposition would seem to be unnecessary.

II.

But even if it were true that the rule had not been complied with and the proceedings did not amount to a sale subject to competitive bidding as held in the *Winona* and *Carlile* cases, it is our contention *(a)* that as there was no decision on this point at the time the rights claimed herein arose, the subsequent decisions of the State Supreme Court were not controlling, and that this court has the right to exercise its independent judgment on the question; and *(b)* that the order and judgment of the County Court made in the exercise of a jurisdiction recognized by the State Supreme Court in its prior decisions was valid, and that under the rule of such decisions a right of property vested in the Prairie Oil & Gas Company by its contract of purchase of such extended leases. In support of these contentions we rely upon:

Kahn v. *Fairmont Coal Company*, 215 U. S. 349;
Burgess v. *Schuyman*, 107 U. S. 20;
Lankford v. *Platte Iron Works*, 235 U. S. 477;
Stanly County v. *Coler*, 190 U. S. 437;
East Alabama Railway Company v. *Doe*, 114 U. S. 340;
Gibson v. *Lyon*, 115 U. S. 439;

Anderson v. *Santa Anna*, 116 U. S. 356;
B. & O. R. R. v. *Baugh*, 149 U. S. 368;
Folsom v. *Ninety six*, 159 U. S. 611;
Douglass v. *County of Pike*, 101 U. S. 677;
Anderson v. *Santa Anna T. P.*, 161 U. S. 361;
Insurance Co. v. *Dobolt*, 16 Howard 415;
Gelpcke v. *City of Dubuque*, 1 Wall. 175;
Havemeyer v. *Iowa Co.*, 3 Wall. 294;
Olcott v. *Supervisors*, 16 Wall. 678;
Taylor v. *City of Ypsilanti*, 105 U. S. 72;
Haskett v. *Maxey*, 33 N. E. 358;
Town of Hardingsburg v. *Cravens*, 47 N. E. 153;
Westinghouse Air Brake Co. v. *Kansas City Southern Railroad Company*, 137 Fed. 26.

In the case first cited, the plaintiff, Kuhn, a citizen of Ohio, sold and conveyed to Camden all the coal underlying a certain tract of land in West Virginia. The deed contained a clause granting unto Camden all the coal and mining privileges necessary and convenient to the removal of the coal, together with the right to enter upon and under said land, and to mine, excavate and remove the coal, etc. Suit was commenced by Kuhn to recover from the coal company damages arising from the failure of the coal company to maintain proper supports so that the overlying surface was caused to fall. It appears that after this deed was executed to Camden, one Griffin brought an action in a court of West Virginia similar in all respects to this one against the Fairmont Coal Company, which was the successor of Camden. Griffin's rights arose from a deed almost identical with that executed by Kuhn to Camden. The *Griffin* case was decided in favor of the coal company and

the case was appealed to the Supreme Court and an opinion rendered (see 59 W. Va. 480) sustaining the lower court. In the *Kahn* case it was urged that the decision upon this question by the Supreme Court of West Virginia was binding upon the federal court sitting in West Virginia. The case reached the Circuit Court of Appeals which certified this question as to the binding effect of the *Griffin* case to the Supreme Court of the United States where the answer was that the decision was not binding upon the Federal Court, and in passing upon the question the court, in an opinion by Justice HARLAN (HOLMES, WHITE and MCKENNA dissenting), announced a rule covering the whole subject of the effect of decisions of the state court in the Federal Court, and we quote from the opinion the following:

> "We take it, then, that it is no longer to be questioned that the Federal Courts in determining cases before them are to be guided by the following rules: *1.* When administering state laws and determining rights accruing under those laws the jurisdiction of the Federal Court is an independent one, not subordinate to but co-ordinate and concurrent with the jurisdiction of the state courts. *2.* Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal Court as authoritative declarations of the law of the state. *3. But, where the law of the state has not been thus settled*, it is not only the right but the duty of the Federal Court to exercise its own judgment, as it also always does when the case before it depends upon the doctrine of commercial law and general jurisprudence. *4.* So, when contracts and transactions are entered into and rights have accrued under a particular state of

> the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the Federal Courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal Court should always lean to an agreement with the state court if the question is balanced with doubt."

In *Lankford* v. *Platte Iron Works*, 235 U. S. 461, which was originally commenced in the Federal Court for the Western District of Oklahoma, the question involved was whether a suit against the State Banking Board of the State of Oklahoma was a suit against the state. The principal opinion held that it was, and in reaching the conclusion, prefaced a reference to several decisions of the Supreme Court of Oklahoma with the following statement:

> "Certainly this construction can be given to the Oklahoma statute; and granting that it may admit of dispute an important element to be considered is the decision of the state tribunals,"

but nowhere in the principal opinion is there any statement to the effect that the decisions of the state tribunal are binding upon the Federal Court.

A dissenting opinion by Mr. Justice Pitney, concurred in by Justices Day, Van Devanter and Lamar, held that it was not a suit against the state, and we quote the following from the dissenting opinion:

> "We are referred to certain cases in the state court of last resort, one of which, and a very recent

one, bears directly upon the question; and it is frankly conceded that proper deference should be paid to them. At the same time, it is not to be forgotten that this action was brought in the District Court of the United States because of the diverse citizenship of the parties —a ground of jurisdiction especially provided for in the Constitution (Article III, section 2). And, however desirable it may be to preserve harmony of decision between the Federal and the state courts, we cannot, with due regard to our duty, fail to exercise an independent judgment respecting the true intent and meaning of the statute, in the absence of an authoritative adjudication to the contrary *previous to the time that the cause of action arose*. For this plaintiff-appellee is entitled to the enforcement of its contract as it was made; and it invokes a Federal jurisdiction that was established for the very purpose of avoiding the influence of local opinion. *Burgess* v. *Seligman*, 107 U. S. 33, 34; *East Alabama Ry.* v. *Doe*, 114 U. S. 340, 353; *Gibson* v. *Lyon*, 115 U. S. 439, 446; *Anderson* v. *Santa Anna*, 116 U. S. 356, 362; *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 372; *Folsom* v. *Ninety-six*, 159 U. S. 611, 625; *Stanly County* v. *Coler*, 190 U. S. 437, 444; *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, 357, 360."

The foregoing dissenting opinion applies the rule announced in the case of *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, to the construction of a statute and the following cases referred to in the dissenting opinion of Mr. Justice Peckham also involve the construction of statutes and apply the same rule as that announced in *Kuhn* v. *Fairmont Coal Company, supra*.

Burgess v. *Seligman*, 107 U. S. 20, involved the construction of a statute of the State of Missouri.

Stanly County v. *Coler*, 190 U. S. 437-443, involved the construction of the Statutes and Constitution of North Carolina.

The first syllabus in *Anderson* v. *Santa Anna*, 116 U. S. 356, reads as follows:

> "When at the time of creating and issuing a negotiable evidence of indebtedness of a municipal corporation in a state the highest court of the state has construed the law under which it purports to be issued rights accruing under that construction will not be affected merely by the subsequent decisions of the same courts varying or departing from it."

At page 362 of this opinion the court discusses the rule where there was no decision construing the statute at the time the rights accrued and uses the following language:

> "If, however, we are in error in our interpretations of the decisions in *Cowgill* v. *Long*, *Schopfeld* v. *Watkins* and *Keithsburg* v. *Frick*, it results that when the bonds were executed there was no decision of the state court in reference to the power of the legislature to enact the Statute of February 28, 1887. In that case the duty of this court is to determine what was the law of Illinois when the rights of the parties accrued."

In *Folsom* v. *Ninety-six*, Folsom brought suit against township ninety-six in the County of Abbeville to recover on bonds of the township issued on March 25, 1886, to aid in building a railroad. In 1888 the Supreme Court of South Carolina held in *Floyd* v. *Perrin*, 30 S. C. 1, and *Whitesides* v. *Neely*, 30 S. C. 31, that the act under which these bonds were issued was unconstitutional and void. It was urged that this decision was binding upon the federal court in the

determination of the case of *Folsom* v. *Ninety-six* but the Supreme Court of the United States held to the contrary and after quoting at considerable length from the case of *Burgess* v. *Seligman*, 107 U. S. 20, uses the following language at page 626:

> "In the case at bar, the Statutes of the State of South Carolina, under which the bonds were issued, were passed in 1882 and 1885. The bonds were issued in behalf of the township and were purchased by the plaintiff, in 1886. It is alleged in the complaint, and admitted by the demurrer, that he purchased the bonds, relying upon their being legal and valid obligation of the township; and that, at the times of their issue and purchase, these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the profession, and by the legislative, executive and judicial departments of the state. And the decisions of the Supreme Court of the state, during the same period, appear to have assumed the validity of such bonds. *Chamblee* v. *Tribble*, and *Carolina Railway* v. *Tribble*, above cited."

And again at page 27:

> "There not being shown to have been a single decision of the state court against the constitutionality of the Act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its views of the law of South Carolina."

We therefore maintain that this court has the right to determine for itself the effect of a violation of Rule 9.

III.

It has long since been settled that under the Constitution and Statutes of the state, County Courts are courts of general jurisdiction with respect to infants and their property.

—*Eaves* v. *Mullen*, 107 Pac. 433;
Scott v. *McGirth*, 139 Pac. 519;
Welch v. *Focht*, 171 Pac. 730;
Holmes v. *Holmes*, 111 Pac. 220;
Baker v. *Cureton*, 150 Pac. 1080;
Hathaway v. *Hoffman*, 153 Pac. 184;
Moffet v. *Jones*, 169 Pac. 652;
Tucker v. *Leonard*, 183 Pac. 907.

Section 11, article 7 of the Constitution provides:

"There is hereby established in each county in the state a County Court which shall be a court of record."

Section 12, article 7, provides:

"The County Court, coextensive with the county, shall have original jurisdiction in all probate matters."

Section 13, article 7, provides:

"The County Court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition and distribution of the estates thereof."

The relevant statutory provisions on this subject are found in sections 3330, 6547 and 6569, Revised Laws of 1910. Section 3330 is a part of the chapter on guardian and ward, and provides:

> "In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

The other two sections are a portion of the chapter on probate procedure. Section 6547 provides:

> "Guardians of infants and insane persons are hereby empowered to lease and grant mineral oil and mineral gas in consideration of a royalty of part or portion of the production thereof and under the same procedure in the County Court as now provided by law where such consideration is money."

Section 6569 provides:

> "The County Court on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders, and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require."

The power and authority conferred on guardians and County Courts by the constitutional and statutory provisions of the probate system in Oklahoma, is as great and comprehensive as that found under the constitution or laws

of any state with which we are acquainted. Here, in express language, is conferred on the guardian and the County Court the power to make oil and gas mining leases *without limitation or the hint of limitation as to the term of the leases*, without limitation or restriction or the hint of limitation or restriction on the power conferred, without regulation of the manner of the exercise of the power conferred save the leasing is to be "*under the same procedure as now provided by law.*" Under this system of laws the County Court is the successor to or inheritor of all probate authority exercised at common law by any court except where such power is limited by constitutional and statutory provisions. Where the legislature intended such power to be limited they have limited it, as for instance, by providing that the County Courts may not order or control the marriage of its wards. This jurisdiction *is in its nature exclusive because it is general in character* and the constitutional provisions do not confer on any other court *any jurisdiction* concerning probate matters except on appeal. It, therefore, of necessity, follows that the County Court is the only court in Oklahoma possessing *original probate jurisdiction*, and that as a consequence of the foregoing constitutional and statutory provisions it possesses all *the power heretofore possessed by chancery courts in the control, management and disposition of the property of its wards and possesses such jurisdiction to a greater extent than possessed by chancery courts.*

In *Duff* v. *Keaton*, 33 Okl. 92, 124 Pac. 291, the Supreme Court of Oklahoma, after reviewing the constitutional provisions, says:

"By sections 1, 2 and 3 of article 7 of the constitu-

tion, jurisdiction of all probate matters is conferred upon the County Court."

It was further held in that case that the sections of the statutes above quoted control the proceedings of County Courts in the sale of an oil and gas mining lease. The legislature has never changed or amended these statutes. It is insisted however that Rule 9 abrogates these provisions, and that the effect of the rule is to render void, for want of jurisdiction, any order or judgment of a court which is the result of proceedings not conducted in strict compliance with the rule. We submit that the rules cannot have that effect, and that the conclusion of the Supreme Court in the cases mentioned is absolutely untenable, for the following reasons:

First. All the authorities hold that a rule of court *cannot take away from, add to, or change the statute*, and therefore Rule 9 could not take away the constitutional and statutory power of the County Court to make the orders assailed in these cases.

Second. Section 5347, Revised Laws of Oklahoma, gives the Supreme Court the power to revise its general rules and make such amendments thereto as may be required to *carry into effect the provisions of the code*. One of the provisions of the code to which effect must be given, as construed in *Duff* v. *Keaton*, is that the probate court has the right to *order a private sale of a lease*. Any rule must therefore *give effect to such a provision*, but the decision of the court in the *Winona* and *Carlile* cases is that the rule *takes it away*. Section 5347 further provides that the court "shall make further rules consistent therewith as they may deem proper." A rule *taking away the very power given by the code, viz.*, the power to make a private sale,

is certainly *inconsistent* therewith and in violation of the statute.

Third. The defendant, The Prairie Oil & Gas Company, could not have anticipated such a construction of Rule 9 because statutes controlling probate procedure, just as mandatory in language and form as the provisions of that rule have been construed, in a long line of decisions by the state Supreme Court, before its rights accrued, as directory only and not affecting the jurisdiction of the County Court.

Conceding the entire correctness of the doctrine that rules of court lawfully promulgated and properly put into effect have the binding force and effect of law, yet if Rule 9 is to be considered in any other light than as being directory merely it must fail and be rejected as of no force and effect because:

(a) It deprives the County Court of the discretionary power conferred by section 6569 of the statutes; *(b)* because it interferes with the exclusive jurisdiction and control of the guardian in the management and disposition of the property of his ward conferred by section 3330 of the statutes; and *(c)* because it is an attempt to limit and control the jurisdiction conferred on County Courts in probate matters by the constitution, and expressly as to the jurisdiction conferred by sections 3330, 6569 and 6547 of the statutes.

It is at once evident that if without Rule 9 County Courts had jurisdiction to approve or direct the making of oil and gas mining leases by guardians on the lands of their wards, without advertisement and without public sale, and such rule is to be construed as to deprive such courts of

such power, *it is a limitation upon the jurisdiction of such courts*, and deprives such courts of the power to be governed and controlled alone by what, in their judgment, is the best interest of the estate of the minor.

This is so because the question is not presented on appeal or on direct attack, but insofar as the particular question under consideration is concerned, each of the cases under review constitutes a collateral attack on the judgments of the County Court, and the question now presented to the court is not whether the County Courts wisely exercised the discretion conferred by law on them; it is not a question of whether the record discloses that the action of the different County Courts was for the best interest of the minor, but the attack is frankly predicated on the assumption that the County Courts had no jurisdiction because of the alleged departure from Rule 9 and that therefore the orders made are void and subject to both direct and collateral attack.

If Rule 9 is to be given the force ascribed to it by the lessors, this court must of necessity hold such rule to be void and of no effect, whereas, if it is held to be directory or advisory, there is and can be no question of its validity, and when two constructions are capable of being placed on the rule, one of which gives it force and effect, and the other deprives it of force and effect, the construction which will give force and effect to the rule is that to be adopted and declared as the true construction.

In order to demonstrate the correctness of these statements it is only necessary to consider a few sections of the state statutes.

Section 1458 (Laws of 1921) provides:

"Guardians of infants and insane persons are

hereby empowered to lease and grant mineral oil and mineral gas, in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court as now provided by law, where such consideration is money."

It appears from the most casual examination of the terms of the above section that guardians are vested with power *(a)* to make a mineral oil and gas lease for a royalty instead of for cash; *(b)* to make a grant of mineral oil or gas in consideration of a royalty instead of for cash; *(c)* that such lease or grant must be approved by the County Court, and in such approval the same procedure must be followed as that provided by law where the consideration of such lease or grant is money; *(d)* that the act presupposes that the power exists in the guardian, with the approval of the County Court, to make oil and gas mining leases and grants for a cash consideration, and also presupposes that a procedure governing such a lease or grant for cash exists.

Assuming this analysis of the statute to be correct, and that it is so scarcely admits of a doubt, it is necessary to discover the statute under which the authority of the guardian to make oil and gas mining leases for cash, and providing the procedure therefor, is given. This statute is found in section 1482 of the Laws of 1921, which is as follows:

"The County Court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders and give such directions as are needful for the

management, investment and disposition of the estate and effects, as circumstances require."

To appreciate the full force and effect of this last section, it is necessary to consider the same together with section 6583 of the statutes, which is as follows:

> "In all cases the court making the appointment of a guardian *has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward.*" (Italics ours.)

These two sections taken together, and in connection with the other statutory and constitutional provisions quoted in this brief, conclusively establish that the County Court is the only court that is given jurisdiction to control the guardian in the disposition and management of the estate of his ward, and that such jurisdiction is exclusive. This means it is free from the dictation, supervision or control of any other superior directing force, and that *to undertake to control, and direct the County Courts, and to say to them that they shall proceed only in a certain manner and by a particular designated method, and to say that unless such power is exercised in the manner and method so prescribed the County Court has not jurisdiction, is to, in reality, control the guardian in the management and disposition of the ward's estate, for when we control the power behind the throne we, in fact, control the throne.* When we say that the acts of the guardian shall be of no binding force and effect unless such acts conform to and receive the sanction of a rule prescribed by any other body than the County Court, we, in truth and in fact, as well as in effect, *control the guardian in the management and disposition of his ward's estate.* When, in addition to the pro-

visions of law, a court lays down a rule, *and says there exists no right of action except in conformity to and in compliance with such rule, it limits, it controls the jurisdiction existing before the annunciation of the rule.*

If the rule so announced deprives the court of *any discretion*, and compels action only in a *particular channel*, regardless of whether the court acting thinks such action is best for the interest of the minor or not, it deprives it of the *discretionary powers vested in it by the constitution and the statutes*, and deprives it of the power to control the guardian in the management and disposition of his ward's estate as to what the court considers to be the best interest of the ward, *and substitutes the discretion of the County Court by the discretion of another court.*

The reason that County Courts and the chancery courts in exercising probate jurisdiction have been invested with discretionary powers in the management and control of the estates of their wards is that human experience has demonstrated the folly of trying to provide for the unknown contingencies that arise in the management and control of such estates by inflexible rule. Such experience has demonstrated the need of *flexibility and the injurious effects of its want.*

It is apparent from the most casual inspection of the above sections of the statute that they prescribe the procedure to be followed in the leasing of minors' lands. The words "as now provided by law," in section 6547, mean something, and must mean that such section proclaims and ordains *the then existing procedure as the procedure necessary to be followed.* The procedure is that found in section 6569 of the statute, that is, that on application to the Coun-

ty Court to lease lands of his ward by a guardian, the County Court has power to make such orders and give such directions as are needful for the management and disposition of the estate and effects of its ward as circumstances may require, and to approve or disapprove the making of such leases as in its discretion the interests of the minor require, and there is nothing in either section of the statute that requires the *application to lease to precede the actual leasing*. There is nothing that indicates a legislative intention to secure the prior authorization of the court to the making of a lease before its execution by the guardian. The only thing necessary to obtain is the approval of the County Court to the lease or grant, and it matters not whether the approval is made prior or after the leasing. In fact, the more orderly method of procedure would be to secure the approval after the leasing. This being the procedure provided by law, no court can make a rule *changing or modifying such procedure unless by constitutional or statutory enactment it is expressly given the power to modify or change the rules established by legislative enactment*. This we believe to be too clear to need further argument or lucidation. In fact, it seems that the above propositions are so clear that argument but serves to conceal and not to explain, and therefore we will proceed to the citation of a few out of the multitude of cases sustaining the above propositions.

In *Duff* v. *Keaton, et al.*, 33 Okl. 93, 124 Pac. 291, the Supreme Court of Oklahoma, by Justice WILLIAMS, impliedly holds that section 1482 is the section under which the County Courts have power to approve oil and gas mining leases of guardians and furnishes the procedure named in section 6547. In such case the court says:

"But it is insisted that these conclusions are contrary to section 5530, Compiled Laws of 1910 (6547, Laws of 1910), which authorizes the guardians of infants and insane persons to lease and grant oil and gas mining rights in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court, as now provided by law, where such consideration is money. But we have heretofore reached the conclusion that the rule existing at common law, by which the guardian was authorized to lease the lands of the ward for a number of years without the approval of the probate court, has been changed by section 5513, *supra* (6569, Laws, 1910), and that by said section said leases in order to be valid must be *first approved by the probate court;* it being specifically provided by said section that the probate court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require. Having also reached the conclusion that such a lease was personalty and not realty, *it is under the procedure by virtue of said section 5513 that oil and gas leases were authorized to be approved by the probate courts, and section 5530 obviously referred to such procedure by virtue of said section. This construction harmonizes all the provisions of said statutes.*" (Italics ours.)

In *Cabin Valley Mining Company* v. *Hall*, 53 Okl. 760, 155 Pac. 570, this court explicitly holds that section 1482 furnishes the procedure referred to in section 6547, the court saying:

"The procedure referred to is that prescribed by section 6569, *supra*, which requires the guardian to make application to the County Court, after notice in accordance with the directions of the judge, where

upon the court is authorized to make such orders and give such directions as are needful and as the circumstances may require. *Duff, et al.*, v. *Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (n. s.) 472. There is no limit in this section as to the terms of the lease, nor any limitation as to the time for which same may run; it being left to the judgment of the court *in the exercise of a sound discretion, TO DETERMINE what is best for the interest of the minor under the circumstances.*" (Italics ours.)

So there is no limitation put upon the authority of the County Court to approve leases except that found in section 1482 of the statutes, and it is left to the sound *discretion of the court*, that is *of the County Court*, to determine whether such lease shall be made, after advertising for bids therefor at public outcry, *or by disposing of the same to a particular named person for a fixed price*. Either of these methods might at different times and under varying circumstances be for the best interest of the minor, and the court without limitation, is given authority by the statute to adopt either of these courses, or any other course, which, in its judgment, will be for the best interest of the minor under the then existing circumstances.

If Rule 9 limits the discretion so reposed in the court, it must, under all the authorities, be held bad, and the only way to uphold and sustain it is to regard it as only directory and advisory, and consequently jurisdiction of the court does not depend upon compliance with its provisions. In *De Lorme, Administrator*, v. *Pease*, 194 Ga. 220, the court, by Justice LUMPKIN, says:

"It is not denied but that this rule of the Supreme Courts restricts the *discretion* of the courts as to the

permission to recall a witness, which was unlimited at common law. *Have the judges this power? Clearly not.* Their power extends to and was intended to embrace all ground *uncovered by the statute or common law.*" (Italics ours.)

In *Adams Express Company* v. *Trego*, 35 Md. 47, the court says:

"If the court below was not satisfied that the ends of justice required a continuance, it was clearly right in refusing to grant it; *and no mere rule of court could be allowed to operate to divest such discretion, or in any manner to change or modify the statutory provision on the subject. Rules of court must not be in conflict or inconsistent with the statute law of the state.*" (Italics ours.)

In *Gormerly* v. *McGlynn*, 84 N. Y. 284, it is said:

"The provision of the Code of Civil Procedure (Sec. 17) authorizing a convention of the general term justices and the chief judges of the Superior Court to establish rules of practice, does not empower said convention to *alter, modify or annul any rule of practice established by the code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code.*"

In *Gates, et al.*, v. *Mack*, 6 Col. 401, it is said:

"The next point made in behalf of the defendants in error is that the appeal was properly dismissed for the default of the plaintiffs in error to comply with a standing rule of the District Court. This rule is set out in the transcript, and provides, substantially, that in any case appealed from the County Court to said District Court, if the appellant shall fail for a period of fifteen days to file in the District Court a transcript

of the proceedings, together with all necessary papers relating thereto, the appellee, upon filing a transcript of the judgment and a copy of the appeal bond, shall be entitled to have the appeal dismissed at the cost of the appellant. Counsel argues that it cannot be fairly inferred that the legislature ever intended to require written notice of a motion to dismiss in a case of this sort, where there is a standing and general rule of court, of which counsel are bound to take notice, providing for a dismissal; that such a rule is a standing notice of such motion, and that this rule is analogous to Rule 26 of this court, under which appeals are dismissed in like manner. *To these propositions we answer that a rule of court cannot supersede a statute.*"

In *Federal Cement Tire Company* v. *Korff*, 50 Ind. Appeals 608, 97 N. E. 185, the court says:

"The rule of court cannot abrogate or prevent the exercise of a statutory right."

In *Twaddle* v. *Winters*, 89 Pac. 289, the Supreme Court of Nevada says:

"Where there is a conflict between a statute and a Supreme Court rule, the former will control."

In *The People* v. *Nichols*, 79 N. Y. 583, the Supreme Court of New York, speaking of a rule which attempted to prevent judges from exercising certain jurisdiction except at stated times, and to designate terms of court at which only certain kinds of business could be transacted, said:

"It is provided by the constitution that the court itself shall have general jurisdiction in law and equity. It follows that this jurisdiction can be limited neither by the legislature nor by any power conferred by it upon the court itself. (*Hart* v. *Hatch*, 3 Hun. 375.) Its

functions are to be exercised by its judges sitting in general terms, or at the circuit or oyer and terminer or special terms. The constitution also provides that each judge may hold special terms in any county (Art. 6, Sec. 7), and neither in that instrument nor in any statute do we find that one special term, or one judge at special term has, or can have, more authority or power than another. The Code (Sec. 233) authorizes the justices of the Supreme Court for each judicial district to appoint the times and places for holding the special terms. This authority was exercised in the first district. Some of the terms thus appointed are designated by the justices as 'Special Terms for Equity Cases and Enumerated Motions,' and others as 'Special Terms for Non-enumerated Motions and Chamber Business,' and, while it cannot be doubted that for the due and orderly conduct of litigation and causes, certain steps and proceedings therein may, under the direction of the judges, be required to be taken at specified terms, yet any such regulation must be subject to the control of the justice who is assigned to hold them. *If otherwise the power of the judge would be limited, public interests sometimes put in jeopardy and the rights of citizens infringed.* The case before us illustrates this position." (Italics ours.)

Again on page 592 the court says:

"It is claimed that this rule has the force of a statute, and that the notice of the argument must, therefore be of eight days. *But the rule is binding only as it is consistent with the Code.*" (Italics ours.)

In *Meyer v. Tupper*, 66 U. S. 582, 17 L. ed. 180, the court says:

"After the passage of the Judiciary Act of 1789, Congress, at the same session, passed the act prescrib-

ing the process to be used in the different courts it had just established (1 Stat. 93); and by the act directed that, in the courts of admiralty and maritime jurisdiction, *the forms and modes of proceeding should be according to the course of civil law.*

"This act left no discretionary power in the admiralty courts, or in the Supreme Court, *in relation to the modes and form of proceeding.*" (Italics ours.)

In *Ward* v. *Chamberlain*, 67 U. S. 430, 17 L. ed. 319, the court explaining the holding in *Beers* v. *Houghton*, 9 Pet. 360, says:

"Explained as above, the remarks are perhaps without objection, *but it cannot for a moment be admitted that any rule adopted by this court, merely as such, can enlarge, diminish or vary the operation and effect* of mesne or final process upon the property of the debtor in respect to the matter under consideration." (Italics ours.)

In *Main* v. *Lynch*, 54 Md. 658, 668, the court says:

"This motion was opposed by the defendants because of the twenty eighth rule of that court which is as follows: 'When a plaintiff or defendant has closed his case on the testimony, and a prayer shall be offered to the court upon such testimony, he shall not offer any additional evidence on the subject to which the prayer refers or with regard to the case in any particular'; but the court permitted the amendment and received the proof offered. It is the ruling of the court on this motion which forms the ground of the first exception. 'This court has always regarded a *legitimate* rule of the court as prescribing a law to the court.' *Dunbar* v. *Conway*, 11 G. & J. 97; and in *Wall* v. *Wall*, 2 H. & G. 82, and *Gist* v. *Drakley*, 2 Gill. 346, this court has said there exists no discretion in an inferior court

to dispense with its own rules, or innovate on the established practice. The rules of court which are, by the decisions referred to, given the force of law, until wholly rescinded, are such rules as a court has the power to pass; *for a court cannot pass a rule which takes away from a party litigant a right positively secured by law.*" (Italics ours.)

In *Saylor* v. *Taylor*, 77 Fed. 476, the Circuit Court of Appeals of the Fourth Circuit had before it for consideration the effect of the following rule:

> "Among admiralty claims of otherwise equal dignity, the one first libeling shall be first paid, but petitioners shall be paid pro rata."

Under this rule, one of the parties in the trial court had been decreed precedence over other plaintiffs. In passing upon the effect of this rule, the court says:

> "Upon reason, upon principle, and upon authority, all of the same class and of equal merit should share equally; and the only question remaining is whether these rights can be displaced by Rule 4 of the District Court, above cited. We are of the opinion that this rule cannot have that effect. The right to make rules is given in section 918 of the Revised Statutes in the words following (citing statute).
>
> "By virtue of this section the courts may make rules of practice, *but they cannot create rules of law.* They cannot divest or displace rights or liens which owe their existence, not to its process, but to the general maritime law. Rights acquired under the Statutes of the United States, or under the general maritime law, which these courts are created to administer, *are rules of property, and it is beyond the potency of judicial power to alter them, or take them away by rules of practice.*" (Italics ours.)

In *Hamilton, et ux.*, v. *Fowler, et al.*, 83 Fed. 321, the court says:

> "These rules of practice and procedure, if regulated by the statute, are imperative, and control the power of the court, for statutory rules of procedure and practice cannot be changed by precedent of decision or by rule of court, but the statute must govern in all cases. As here, when the statute says that the parties shall have until the first day of the next term of the court to file their record, it means that they shall have that time, and, when the statute says that 'the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court,' it means that it shall not thus proceed before that time, and anything that has not already been done in the case cannot be done until that time, in the normal and orderly course of procedure. * * *."

In *Patterson* v. *Winn, et al.*, 5 Pet. 233, 8 L. ed. 108, the court was considering a rule which prescribed the method of proving lost instruments and providing that secondary proof of their contents could only be received in accordance with the rule. Proof of the instrument did not accord with the rule but did fulfill the requirements of the common law. In passing on the question, the court said:

> "We think that according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the loss or destruction of the originals to let in the secondary proof; *and that it was not competent for the court to exclude it by its own rule.* However convenient the rule might be to regulate the general practice of the courts, we think that it could not control the rights of the parties in matters of evidence admissible by the general principles of law. The judgment must therefore be reversed and the

cause remanded to the Circuit Court with directions to award a *venire facias de novo.*" (Italics ours.)

In *St. Louis & San Francisco Railway Company* v. *McAllister*, 165 Pac. 1123, this court says:

> "Of course, courts have the inherent power, independent of any statutory provisions, to promulgate rules for the regulation of their practice and business; but they can make *no enforceable rule that contravenes a statute or the law of the land.*" (Italics ours.)

Gooduin v. *Bickford*, 93 Pac. 548, involved the validity of a rule of Oklahoma Territorial Court requiring that the plaintiff in error in an appeal from the probate court make a deposit of $5.00 to apply on the costs of the clerk of the District Court. In holding the rule repugnant to the statutes then in force, the court says:

> "We shall consider the second reason assigned first; for, if it is well founded, it will not be necessary to consider the first reason assigned. It is a well-settled principle of law that courts, independent of any statutory provision, have the inherent power to make rules for the regulation of their practice and business, but they can make no rule that contravenes a statute or the law of the land. *Prendeville* v. *People of the State of Illinois*, 42 Ill. 217; *August Fisher* v. *National Bank of Commerce*, 73 Ill. 34; *Thomas Purcell* v. *Hannibal & St. Joseph Railroad Company*, 50 Mo. 504; *United States* v. *James G. Swan, et al.*, (D. C.) 77 Fed. 473. It cannot be said that, in imposing costs and prescribing rules governing their collection, in the practice of a court, that a different rule from the one announced above applies, or that a court has control over the same superior to the legislative department of the government, and that a court may make a rule governing the

same in conflict with the statute, because courts had no power at common law to impose costs, and such power exists only when authorized by statute, and a court in prescribing rules relative to the costs authorized by statute to be imposed by it cannot, in doing so, contravene a statute. *Maggie E. Bradford* v. *Southern Railway Company*, 195 U. S. 243, 25 Sup. Ct. 56, 49 L. ed. 178.

* * * * * * *

"* * * We could hardly conceive of a statute that could prescribe more specifically the detailed requirements necessary to perfect an appeal, and how the same shall be disposed of; but it does not require that any deposit for costs shall be made in order to perfect the appeal. On the contrary, it is specifically provided that after the appeal has been transmitted by the probate judge to the district clerk, to be filed in his office, without even a summons or notice to defendant in error, the case may be heard at any day of any general or special term of the court, and that if, when the case is called appellant does not appear, the same may be dismissed on motion of the appellee. There is nothing in this statute that will permit the construction that anything else than what is mentioned therein is required to be done, or may be required to be done, by the court before the appeal is perfected; and under the language of the statute, when the appeal has been perfected, it may be heard at any general or special term of the court. Any rule of the court requiring additional things to be done by the appellant than those prescribed by the statute herein quoted would contravene the statute, and would be invalid."

The statute governing defaults in Ohio provided that "in an action upon an account or written instrument for the payment of money only or in foreclosure, judgment may

The Circuit Court of the United States, in Alabama, by a general rule adopted the practice of the state courts which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court unless with the consent of counsel. In this case bill of exceptions was signed by the judge of the Federal Court after the adjournment of court and without consent. In holding that this was sufficient although not complying with the rule, the court in *United States* v. *Breitling*, 20 How. 252, said:

> "But the answer to this objection is, that the statute of Alabama, and the regulation it prescribes to the courts of the state, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. And it is always in the power of the court to suspend its own rules or to except a particular case from its operation, whenever the purposes of justice require it."

The Circuit Court of Christian County, Missouri, had a rule which required the defendant in a criminal case who desired witnesses in excess of a certain number to make application supported by affidavit setting forth the names of the witnesses and the facts which witnesses were expected to testify to. After quoting the bill of rights of the Constitution of Missouri and the statutes relating to process for witnesses in original cases, the court, in *State* v. *Gideon*, 119 Mo. 94, says:

> "The statutes are sufficient, if carefully and faithfully executed, to exclude the fees of all unnecessary witnesses; more severe than this, they ought not to be.
>
> "It is sufficient to add that this rule imposes harder terms than the statute does, and for that reason it cannot be enforced. The conclusion we have reached accords not only with our own decisions, but with those

of other courts of last resort in the several states: *Hickernel* v. *First National Bank*, 62 Pa. St. 146; *Oates* v. *Mack*, 6 Col. 401; *State* v. *Posey*, 17 La. Ann. 252, 87 Am. Dec. 525; *Patterson* v. *Winn*, 5 Pet. 242."

There is an extended note to this case in 41 Am. St. Reports and the limitation upon the power to prescribe rules is discussed fully, beginning at page 641.

State v. *Posey*, 17 La. Ann. 352, 87 Am. Dec. 525, was a proceedings for mandamus and the plaintiff alleged that she had instituted suit for a money judgment and that the case, being ripe for default, she asked for a judgment and that judgment was refused. The judge responded that he had adopted a rule for the term and under similar circumstances would renew it at another term "that no cases should be tried except the criminal cases and matters of succession" and that he was induced to make this rule by reason of the distress of the people immediately following the civil war. The court, in granting mandamus, announced the rule as follows:

"In this case the judge has, without even a request from either party, arbitrarily forced a continuance. He has yielded to solicitations of persons, not parties, and deprived relatrix of the legal right of trial of her cause.

"The judiciary is not by the constitution invested with legislative powers. It has no authority to deprive the citizen, by its rules, of his legal rights.

"The judge must conform to the law, though he should think that thereby certain citizens would be injured, or that its provisions do not exactly come up to a proper administration of justice. If the citizens desire relief by the alteration of the law, for the administration of justice, they must apply to the law-making power and not to the judiciary."

In *Suckley's Administrator* v. *Rotchford*, 13 Grattan 60, 65 Am. Dec. 240, it was said:

> "In my opinion the appellant's intestate was rightly in court praying the relief sought. His proceedings for maturing his case seem to have been had under the laws of Virginia in force February 27, 1801. I perceive no error therein, taking, as I do, the recitals in the decree as sufficiently showing that the case had been regularly proceeded in. If it should be conceded that a rule of the court did require the bill to be filed before the subpoena issued, still, as the law directed otherwise, the law must prevail. Although the Supreme Court had authority to prescribe rules of practice in the Circuit Court, those rules must be subordinate to the law. Although Congress might have repealed or altered the law, yet it could not delegate that authority to another body."

The Superior Court of Cook County, Illinois, adopted a rule whereby an action *ex contractu* may be brought to trial out of its order upon the docket, upon the affidavit of the plaintiff of a belief that the defense is made for delay, unless it is made to appear by affidavit of facts in detail that the defense is made in good faith. The Supreme Court of the state, in *Fisher* v. *National Bank of Commerce*, 73 Ill. 34, held such a rule to be void and said:

> "And the defendant, in such case, to entitle himself to a trial *under the statute*, is only required to file an affidavit with his pleas, stating that he verily believes he has a good defense upon the merits, while *under the rule of the Supreme Court* he is compelled to make it appear to the court by affidavit of facts in detail, that the defense is in good faith. The practice, being regulated by law, must, under the Constitution, be uniform; and from whatever source the Superior Court

may have assumed to derive its authority to adopt the rule, inasmuch as it is *inconsistent with the general law*, it is void and of no effect." (Italics ours.)

If we are correct in our conclusion that Rule 9 is a rule of procedure only, and admitting that it is binding upon the County Courts and litigants in the sense that the latter have a right to invoke it, yet, if the rule is not invoked at the time, and during the course of a proceeding which results in judgment, can such judgment be afterwards collaterally assailed in an independent proceeding because the court and the parties to the transaction failed to observe the rule? The question, we think, should answer itself.

In a long line of decisions the Supreme Court of Oklahoma has construed certain statutes relative to the proceedings of probate courts in respect to infants and their property as directory only, a failure to observe which, while irregular and erroneous, is not fatal to the jurisdiction. Some of these cases decided prior to the time the rights in question here arose, are:

Spade v. *Morton*, 38 Okl. 384;
Eaves v. *Mullen*, 107 Pac. 433;
Hathaway v. *Hoffman*, 153 Pac. 184;
Baker v. *Cureton*, 150 Pac. 1060;
Sackey v. *Winstock*, 144 Pac. 372;
Parmenter v. *Ray*, 158 Pac. 1183;
Cowen v. *Hubbard*, 151 Pac. 678;
Cowles v. *Lee*, 128 Pac. 688;
Cabin Valley Mining Co. v. *Hall*, 155 Pac. 570.

These cases held that various statutory provisions, although just as mandatory in form and language as Rule 9,

are directory merely and did not affect the jurisdiction of the court.

In *Spade* v. *Morton* and *Eaves* v. *Mullen*, it was held that the faliure to conform to the statute requiring notice by advertising of all sales of an infant's real estate was not a jurisdictional defect. *Baker* v. *Carleton* and *Hathaway* v. *Hoffman* held that the failure to give notice of the appointment of a guardian, although the language of the statute in that respect is mandatory in its form at least, was jurisdictional.

In *Parmenter* v. *Ray* the provision of section 5285 of the Revised Laws of 1910 requiring that the probate court in the appointment of a special administrator *must* give preference to the person entitled to letters testamentary or of administration was held not to be mandatory but that in making such appointment the court may exercise jurisdiction, and the court refused to follow the case of *In re Mine*, (Montana) 38 Pac. 228, holding the contrary.

Cowen v. *Hubbard* held that a defective petition for the sale of lands gave the court jurisdiction and that a sale thereunder was not subject to collateral attack.

In *Welch* v. *Focht*, 171 Pac. 130, the Supreme Court, speaking through Justice RAINEY, summing up the doctrine announced in these cases, says:

> "Before we proceed further it might be well here to call attention to the fact that there is quite a conflict in the authorities on the question as to what constitutes jurisdictional defects in the proceedings for the sale of the ward's real estate. As was observed in *Eaves* v. *Mullen*, *supra*, practically all the courts agree that there are many defects in the sale proceedings of a

ward's real estate which will not render the proceedings void. Some courts hold that practically all of the statutory steps are jurisdictional but we have adopted the other rule, and there are many compelling reasons unnecessary to be stated at this time, why we should not at this late day depart therefrom."

Probate courts for many years have acted in accordance with the doctrine established in this jurisdiction by the foregoing decisions. They have announced a principle that irregularities, errors, failure to observe some statutory provision, although mandatory in its language and form, do not affect the jurisdiction of the County Court so as to make its judgments and orders subject to collateral attack. In this state of the decisions it could hardly be anticipated by the parties to the transaction in question that the court would completely reverse itself and adopt that strict construction of the controlling statutes which by a course of decisions extending over many years they had refused to do. The Prairie Oil & Gas Company was justified in assuming that Rule 9, although having the force and effect of a state statute, would be deemed directory only and as a mere rule of procedure not affecting the jurisdiction of the County Court. Certainly it could never have anticipated that the Supreme Court would do what no other court has ever done, that is to say, promulgate a rule in pursuance of a statute giving it authority to make rules to carry into effect the statutes of the state, and then construe the rule as superior to such statute.

The statement in the *Winona* case that the probate rules grew out of, and were made necessary by the opinion in *Duff* v. *Keaton*, *supra*, is incorrect. These same rules were in force in most of the probate courts on the east side of

the state prior to their promulgation by the justices of the Supreme Court of Oklahoma. Their main purpose was to secure uniformity in the rules governing transactions relative to Indian lands and to fix certain specified dates upon which such matters would be heard so that the United States probate attorneys, who in many cases had to attend more than one court, might have an opportunity to be present and in order that the dates of hearing in the various counties over which he had jurisdiction might not conflict. One or two of the county judges would not agree to this plan, and it was for that reason the justices of the Supreme Court were appealed to for the purpose of making it obligatory on all the probate courts to adopt the same rules. It may be true that a public sale of leases, after notice, was the policy, both of the state courts and of the originators of the rules but in *distinct recognition of the power of the court to order a private sale under the statute* it was expressly provided in Rule 18 that *notice might be waived* unless it was a notice required by law, that is, by a statute of the state.

The case of *Winters v. Oklahoma Portland Cement Company*, 164 Pac. 983, cited in the *Winona* case in support of the court's conclusion has no application to the question. That case involved a substantive law—an act of the legislature taking away from the County Court its necessarily admitted *former discretion and power* to confirm a sale of a minor's land at private sale for less than ninety per cent of its appraised value. The act of the legislature was not for the purpose of regulating the procedure of such a sale, for in express and mandatory terms it prohibited it. Suppose such act had not been in existence; would the court then have had power by a *mere rule* to prohibit such a sale? And could the Supreme Court now by *rule* provide that a sale

for less than *ninety five* per cent of the appraised value should be valid notwithstanding the statute permitting its confirmation for *ninety* per cent? If the answer is that it could not do so because such a rule would be inconsistent with the statute, then of course the whole argument falls to the ground for Rule 9, if construed to *prohibit* a private sale, is inconsistent with the conceded, acknowledged and decided power of the court, prior to Rule 9, to direct a private sale.

Cabin Valley Mining Company v. *Hall, supra*, decided February 16, 1916, involved the making of a private contract between the only persons interested, the lessor and lessee, extending the term of an existing lease. The question in the case was as to whether a County Court had jurisdiction to authorize the extension of a lease theretofore made by a guardian to the lessee in that lease. The County Court in that case had authorized the guardian to make and execute a contract with the lessee of an existing lease, extending the term. It was held that the power and jurisdiction of the County Court, not being inherent, were to be determined by the constitution and laws of the state, and the conclusion was reached that, under the Constitution and Statutes of Oklahoma, the court had such power and that the grant of power embraced authority in these courts to afford such relief as was formerly administered by courts of equity in like matters. This court in *Tibbets* v. *Clayton*, 288 Fed. 393, called attention to the *Cabin Valley Mining Company* case, and other decisions of the State Supreme Court, establishing and recognizing the practice in County Courts in respect to extending the terms of existing leases without a public sale, and recognizing the jurisdiction of such courts in the premises.

The decision in the *Cabin Valley Mining Company* v. *Hall* case, which cited other decisions of the same court in support of its conclusions, was only four months old when the County Court directed the extension of the leases in question, and approved the terms of the agreement which had been reached between the guardian and the lessee, Los Angles Cherokee Oil Company. That decision had not been reversed or modified when The Prairie Oil & Gas Company purchased the leases so extended in April, 1917. True, Rule 9 was then in force, but could it be contemplated that the Supreme Court of the state would apply, or that it would have the power to apply, that rule so as to give it the effect of a mandatory statute of the state depriving the County Courts of their jurisdiction to do every thing which it was held in the *Cabin Valley Mining Company* case and other cases they had the power to do under the constitution and laws of the State? Could it be then supposed that the justices of the Supreme Court could, under their right to make rules of procedure, usurp the functions of the legislature, for that is really what *Winona* v. *Barnes* decided. We agree that the Supreme Court may prescribe rules of procedure for inferior courts and that it may enforce obedience to the rules, not only by parties to legal proceedings in these courts but by the courts themselves. But we cannot concede without doing violence to the principles upon which our form of government rests, the power of the Supreme Court, or its members, to declare that such rules cannot be waived by the parties interested, and that their strict observance is essential to the jurisdiction of the County Courts, a jurisdiction which they exercised, with the full approval of the Supreme Court, and by virtue of the constitution and statutes of the state, long before the rule was enacted, and which jurisdiction indeed the rule itself impliedly recognizes.

If then The Prairie Oil & Gas Company purchased these extended leases at a time when the state Supreme Court by its decisions, had recognized the authority of the County Court to grant the extension by its approval of a contract between the parties interested to that effect, and could not have anticipated that the existing rules were anything more than regulatory of the procedure, which might be waived, and could not affect a completed transaction in which all parties interested had acquiesced, and to which they had given their free consent, so far as the record discloses, then it acquired a vested property right of which it cannot be divested merely because the Supreme Court, subsequent to that time, has given to a rule of procedure the effect of substantive law, and has construed it to be mandatory and its observance a condition to the jurisdiction of the County Court. As said in *Haskett* v. *Maxey, supra:*

> "Courts of last resort are often constrained to change their rulings on questions of the highest importance. When this is done, the general rule is that the law is not changed, but that the court was mistaken in its former decision, and that the law is, and always has been, as expounded in the last decision. But to this general rule there is a well established and well understood exception. This exception is that: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment'."

The argument based upon *Ex parte Virginia*, 100 U. S. 313, that because the Supreme Court of Oklahoma decided

in *Freeling* v. *Kight*, 152 Pac. 362, that it had power to mandamus a probate court to recognize these rules, the decision necessarily amounted to a holding that the rules go to the jurisdiction of the probate court, is a *non sequitur*. The right to a superintending control of inferior courts is older than American civilization. It is that exercised for many centuries by the Court of King's Bench over the inferior tribunals of England. (2 Blanckstone, p. 111.) Such superintending control was for the purpose of keeping inferior courts within the bounds of their jurisdiction; certainly not to impair that jurisdiction. The provision of the Oklahoma Constitution quoted by petitioners that "the original jurisdiction of the Supreme Court shall extend to a general superintending control of all inferior courts and all commissions and boards created by law," was not the source of the power of the justices of the Supreme Court of Oklahoma to make rules for inferior courts. That power is granted to them by section 5347, Revised Laws of 1910, and in the preamble to the adoption of the rules they expressly state that the rules were made pursuant to that section. If it were true that the constitutional provision referred to was the source of power to make the rules in question, as intimated in the *Winona* case, then the legislature could not take away such constitutional power from them and could not legislate on that subject, as it attempted to do by the Act of April 4, 1919, Session Laws of Oklahoma, 1919, page 288. That position is contradicted by the action of the justices of the Supreme Court when, on June 11, 1917, they recognized the right of the legislature to legislate on the subject, by revising the rules so as to omit Rule 10, because "the matters regulated therein have been provided for by statute." (171 Pac. IX.)

The case of *Freeling* v. *Kight, supra,* is cited by petitioners as holding that a County Court is without authority to dispense with the probate rules. Of course the power of the Supreme Court to make a rule of procedure a matter of jurisdiction so as to take away the constitutional or statutory authority of inferior courts, is not determined merely by the claim that it has that power, so far as this court is concerned. But let us see what was involved in *Freeling* v. *Kight*. The County Court of Rogers County had, on June 5, 1914, adopted these same probate rules, which had in fact been suggested to all the probate courts by the Department of the Interior. After the promulgation of the rules by the justices of the Oklahoma Supreme Court, they were readopted by the Rogers County Court on July 15, 1914, and continued in force until July 4, 1915, when the county judge made an order vacating and setting them aside, and adopted other rules in conflict therewith. The state, on relation of Freeling, its Attorney General, applied for a writ of mandamus to compel the county judge to observe the rules. But there was not involved in that case the validity of any judgment or order of the court with respect to any matter pending before it, or any transaction completed with the consent or acquiescence of all parties in interest without a compliance with the rules. No construction or interpretation of the rules, or their effect, upon acts done by the court under them, was involved. The sole question presented was the right of the justices of the Supreme Court, under the statute referred to, to make and enforce obedience to its rules, prescribed "for the proper and expeditious conduct of the business of said court and other courts of record of said state." That right, even without an authorizing statute, may be conceded. That was the only thing which the

court was called upon to decide in the *Kight* case. It was the only thing which it did or could decide. The question here was in no way involved. The only observation of the court in that case which at all pertains to the question here was that a rule of court has the force and effect of law. We admit that, of course, in the sense that it must be obeyed by the parties interested in the subject-matter to which it applies. Either that court, or counsel here, has confused law in the substantive sense with law in the sense of regulation and procedure. The legislature has the power, for instance, to make a certain act criminal which otherwise would not be so, and to fix the punishment. But could a court, by a rule, make such a "law?" The court may by rule *regulate the manner of conducting a private sale* which is admittedly authorized by the Oklahoma Code—and which the state court has often recognized—and such a rule, of course, has probably the same force and effect as a statute of the legislature enacted *for the same purpose*. But the court could not by rule *prohibit* a private sale. Its power is to *regulate* the procedure in the doing of a lawful act, not to *prohibit* the doing of the act itself.

The statute, under which the Supreme Court justices acted in making the rules, makes it their duty to meet every two years during the month of June at the capital of the state "and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this code."

—Section 880, Revised Laws, 1921

Now, one of the provisions of the code to which effect must be given is that the probate court has the right to order the private sale of a lease. That is necessarily so, both

under the statute and the prior decisions of the court. Any rule made by the justices must therefore give effect to such provisions; but the decision of the court in the *Winona* case is that the rule takes it away. The section quoted further provides that the justices of the Supreme Court "shall make rules consistent therewith as they may deem proper"; that is, consistent with the code. A rule taking away the very power given by the code, namely, the power to make a private sale, is certainly inconsistent therewith and in violation of the statute.

—*Beers* v. *Haughton*, 9 Pet. 329.

IV.

The second proposition urged by petitioners is that the extensions should have been set aside because of fraud in obtaining them.

The fraud charged in these cases was that the extensions of the leases were void for the reason that they were

> "procured by the fraud, duress and false dealing of the Los Angeles Cherokee Oil Company so exerted that the said agreement was procured for a grossly inadequate consideration, the actual value of the said agreement at the date thereof being not less than $175,000.00, while the consideration actually paid was only $18,000.00, the lands herein described as the allotment of the said William G. Twist, deceased, and covered by this action, being included in said extension agreement. That said false and fraudulent dealing and duress consisted of the following acts and representations, to-wit: That the officer of the said Los Angeles Cherokee Oil Company having full and complete control of the operations of the company, and all its business was one

J. F. Pitt, and another of the said officers was one H. P. Anderson; and that said officers and agents of the said company, expecting to secure the said agreement and with the view of obtaining influence and the friendship and confidence of the said Leoria L. Twist Weldy, the said guardian, proposed, agreed to and did execuite her bond as guardian, and are now the bondsmen upon the guardian's bond of the said guardian. That prior to the date of the said agreement, they, and particularly the said Pitt, advised the said guardian that it was beneficial and to the best interest of the said wards that such an extension agreement should be executed, and that a consideration of $18,000.00 was adequate and sufficient therefor, which said statements and representations were false and known to the said Pitt to be false, but which said representations were relied upon by the said guardian, who placed implicit confidence in the judgment of the said bondsmen, knowing them to be practical and experienced oil men. That to further the said scheme to secure the said agreement the said officers and agents approached the attorney for the said guardian, E. Robitaille, and endeavored to secure his co-operation, and also sought the influence of the ward, Albert T. Twist, and failing to secure their aid in their efforts they resorted to threats, and advised the guardian that they would be compelled to complain to the court of her failure to do what they represented to be for the best interests of the wards, and suggested to the said son of the guardian, Albert T. Twist, that his mother could be removed as guardian if she failed to carry out their desires; and the guardian, believing that this course was capable of being pursued by them, and fearing that the affairs of her children might be placed in the hands of strangers, consented to the proposed agreement, and signed the papers prepared for her by the said officer of the said company. That to further lull the suspicions of the

guardian, and to present the appearance of fair dealing, the said Los Angeles-Cherokee Oil Company, through its said agents, officers and attorneys, prepared what purported to be a notice of sale, so that it appears that notice of public sale was given, but plaintiffs aver that said notice is in fact a notice to show cause why a sale should not be had, and that no order of sale was in fact ever made and entered by the court, and no public sale had, but that the agreement was made pursuant to an understanding had prior thereto, and without opportunity to others than the said Los Angeles-Cherokee Oil Company to bid thereon." (R. 5, 6 and 7.)

The testimony of Leoria L. Twist Weldy, so far as it relates to the charge of fraud, is as follows:

Q. The Los Angeles-Cherokee Oil Company operated this property and produced oil from it?

A. Yes, sir.

Q. And each of the tracts, did they?

A. Yes, sir.

Q. After the period of operation was any inquiry made of you with regard to changing the form of the leases?

A. There was.

Q. When and by whom?

A. Well, at different times, by Mr. Pitt, also Mr. Anderson at one time.

Q. Mr. Pitt and Mr. Anderson to whom you refer were gentlemen associated with the Los Angeles-Cherokee Oil Company?

A. They were; they belonged to the company, stockholders.

Q. Do you remember how long before certain court proceedings were instituted they first begun to talk with you about the extension of these leases or the changed form of the leases?

Mr. Davidson: We object to that as incompetent, irrelevant and immaterial to any issue.

The Court: I will let it go in the record.

Mr. Davidson: Exception.

A. Well, it was in 1909, the first time they ever named it to me.

The Court: Who named it to you?

A. Mr. Pitt and Mr. Anderson were both together.

The Court: Who is Mr. Pitt?

A. He was a stockholder and foreman or something for the Prairie people.

Q. He had charge?

A. Yes, sir.

Mr. Davidson: It surely couldn't be material back as far as 1909.

The Court: No.

Q. Just prior to the institution of the court proceedings did Mr. Pitt or Mr. Anderson on behalf of the Los Angeles Cherokee Oil Company talk to you in regard to the changing of the form of the leases?

A. Yes, sir, Mr. Pitt did several different times for the last year or two before we did change.

The Court: Mr. Linebaugh, she signed a petition here which sets out these facts. I don't see the relevancy of any conversation she had with them.

Mr. Linebaugh: Well, to show why she filed the petition.

Q. You filed a petition with the County Court of Tulsa County asking that the form of these leases be changed or the terms be changed?

A. Yes, sir.

Q. Who prepared that petition?

A. Well, I think that Mr. Rice & Lyons. I am not sure.

The Los Angeles-Cherokee had them prepared themselves.

Q. Where were you when you signed the petition, if you remember?

A. I think I was at home.

Q. Who brought the petition to your home?

A. Mr. Pitt.

Q. Why did you sign the petition?

Mr. Davidson: We object to that.

The Court: I will see what her answer is.

A. Well, there was various reasons.

Q. Tell the court what those were.

A. Well, kind of fear, to be positive.

The Court: Fear?

Q. Fear of what?

A. Well, I had been getting letters from different oil companies around me——

The Court: Oh, well; I will exclude that.

Mr. Linebaugh: I think probably this will be of some importance, your honor.

The Court: Why?

Mr. Linebaugh: The fact that she had received letters saying that they were going to put vacuums on wells adjacent to her property. Mr. Pitt says if vacuums are put on we will have to put vacuums on and that will draw all the oil out very quickly and you had better take this $18,000.00. But we will show immediately after she filed this petition those letters stopped coming and no vacuum was put on.

The Court: I will let it go in and hold against you on it.

Mr. Linebaugh: That is merely one of the circumstances.

The Court: If that is all you have got.

Mr. Linebaugh: No, that isn't all, your honor.

The Court: That is a reflection on her as guardian. Who was your attorney, madam?

A. I didn't have any to represent me at that time, they done all the work themselves. I was in very poor health. I had had one but I didn't have any right at that time because they said it wasn't necessary, they would fix the papers all themselves.

Mr. Davidson: Did Mr. L. J. Martin represent you?

A. No, not at that time.

Mr. Linebaugh: We offer to prove——

The Court: Don't offer to prove, but put it in there.

Q. You may go ahead with the statements, if any, that were made——

The Court: Statements made by Mr. Pitt. The letters are the best evidence of what they contained.

Q. What statements, Mrs. Weldy, if any, did Mr. Pitt or Mr. Anderson make to you at the time they were discussing with you the question of changing the form of the leases with regard to the installation of vacuums on the wells?

Mr. Davidson: We object to what Mr. Pitt says. Her evidence is, Mr. Pitt was foreman.

The Court: She testifies Mr. Pitt came to her to get her to sign the extension. If he made any negotiations that would be evidence that he was acting for his company.

Mr. Linebaugh: You may answer.

A. Well, he said that if the other companies put those vacuums in they would soon kill the life of the wells, and also when he was wanting me——

The Court: Now, let me ask you a question. If you didn't extend the leases you would get the wells back, wouldn't you?

A. Certainly.

The Court: Then you could have had vacuums put on or made arrangements?

A. Yes, but if they had put them on they would have killed those wells before we got them back.

The Court: They would have forfeited the leases if they hadn't.

Mr. Linebaugh: Those are facts, we know, but she didn't.

The Court: Yes, but it was her business to go to her counsel. If you are going to have such clap trap as that, then no contract is sacred.

Q. What, if anything, did Mr. Pitt tell you would be the effect of placing vacuums upon the wells?

Mr. Davidson: We object to all this.

The Court: I am going to let them put it in and hold against them.

A. They said it would suck all the oil out of the ground. He said if we don't the other companies will get the oil.

The Court: That is no false statement. That is a fact. She had her rights. If they failed to produce the oil she could go and have it cancelled.

Q. Mrs. Weldy, at that time were you having any difficulty with reference to your bond as guardian?

A. Well, I was under surety bond which was costing me quite a bit.

Q. What statements, if any, with regard to your bond did Mr. Pitt or Mr. Anderson make to you during the period of these negotiations for the change of the terms?

Mr. Davidson: We object to that.

The Court: I sustain the objection. The Prairie Oil & Gas Company couldn't have had notice of such as that.

Mr. Pinson: The burden would be on the defendant to prove good faith.

The Court: No, not in that.

Mr. Linebaugh: We will offer to prove by this witness that during this negotiation Mr. Pitt and Mr. Anderson discussed with her the question of her bond and inability to continue it and avowed their willingness to make her bond so that she could retain the guardianship for such amounts as would be necessary, providing she would consent to, accede to their request to sign the petition for the extension of the leases, and subsequently they did in fact make her bond ——

The Court: Suppose they did?

Mr. Linebaugh: Becoming surety and that—that was—well, I am making an offer—and such bond with Anderson and Pitt as sureties was filed in the County Court of Tulsa County and was of record at the time of the purchase by The Prairie Oil & Gas Company.

The Court: Suppose they did go on her bond, what effect would that have? How could that constitute fraud?

Mr. Linebaugh: It would constitute fraud when taken with the other circumstances, it seems to us.

The Court: I exclude that evidence. She says she had difficulty with her bond and they said they would help her make it. What is wrong about that?

Mr. Linebaugh: They are using that as an inducement, saying we will agree to make your bond, providing you will do this for us.

The Court: No, I don't think that is competent.

Mr. Linebaugh: We except

Mrs. Webb ——

The Court: I will see what she has to say. You say Mr. Pitt come to you about signing the petition?

A. Yes, sir.

The Court: What did he say to you?

A. Well, of course, he asked me if I wouldn't make a commercial lease, is what he called it; he didn't say anything about a transfer. I told him "Mr. Pitt, I don't care to, because while I am under the Departmental lease we have the protection of the Department." He says, "You have the protection of the whole state under a commercial." I says that wouldn't be much when I had it; no, I don't feel like making that. He made the remark: "You have always done the best for your children in every way." He says, "Do you think by refusing this offer that you are still doing right by your children?" And he says, "Do you think that the court will think that you are doing right?" Of course, I studied about it, and I told him I didn't know what the court would think. He says: "You know there have been a good many guardian seekers' eyes on your minors all the time." And of course when he made that remark it throwed a kind of fear over me that they might try to take the guardianship away from me. That is one of the things that caused me——

The Court: Never mind. What else was said?

A. I don't remember every detail. I told him I didn't like to accept it, but of course I did. He went up and got the papers.

The Court: He told you he would give $18,000.00 for a new lease; is that what he said?

A. For a commercial lease.

The Court: Well, that would be a new lease. Then you signed this application, a copy of which has been offered here?

A. Yes, sir.

The Court: Go ahead.

Q. What statements, if any, did he make to you with reference to the value of the property?

The Court: Don't make suggestions.

A. Well, I told him I didn't think it was enough. He says, "Sure it is enough; it is really more than the leases are worth." And that is when he come over it again. He says, "Do you suppose that the court will think that you are still doing the best for your children if you refuse that?" And that is about all of it that I can remember.

Q. Did you subsequently, after filing the petition, go to the County Court room in Tulsa?

A. Yes, sir.

Q. Who, if any person, accompanied you?

A. Mr. Pitt come and taken me in his car.

Q. Was anyone with Mr. Pitt, or did just the two of you go?

A. I won't be positive, but there was no one went up to the court house with us. I think the other parties were already there.

Q. What other parties?

A. There was one attorney there and I don't know whether it was Rice or Lyons because I was not acquainted with them at the time.

Q. When you got to the court room what happened?

A. Well, Mr. Pitt taken the papers up to the judge.

The Court: You mean he had the papers with him?

A. He had papers with him.

The Court: Why, the petition you filed was in court, wasn't it?

A. He went up and talked to the judge a few minutes.

Mr. Linebaugh: This was on the day of the confirmation, your honor.

The Court: Yes, but the petition she signed would be a part of the court files.

Q. Were you ever in the County Court room concerning this matter except this one time?

A. No, sir.

The Court: You were there when they had the hearing and the judge determined to permit you to make a commercial lease; were you present then?

A. I think the papers were signed at my own house and taken up by them.

The Court: They had been signed but on the day of the hearing you appeared in court and the court granted you authority to make a new lease?

A. It was all done at the same time.

The Court: That was the time you appeared before the court, wasn't it?

A. Yes, sir.

The Court: Judge Ramsey?

A. Yes, sir; Judge Ramsey.

The Court: And Judge Ramsey talked to you about that?

A. Very little. He asked me if I thought I was doing for the best interest of my wards. I told him I did, owing to the conditions surrounding. He said, "I am satisfied that you are; you always have done such." And he says, "I, in my own mind, think it is best." And that is about all that occurred in the court room that day.

Q. Had you signed the papers at that time?

The Court: When did you sign the new lease, there in the court that day?

A. I won't be positive whether I signed it there. I know we went on up to their attorney's office and there was some papers signed there.

Q. Was there any evidence taken in the court room, that

is, were any witnesses sworn and their testimony taken?

A. No, sir.

Q. Were you sworn and your testimony taken or just these questions asked you at the judge's bench; was there any auction sale conducted in the court room?

A. No, sir, not while I was there.

The Court: Well, do you know whether there was any other evidence taken before the judge?

A. There were none taken while I was there. There were no questions asked anyone else while I was there.

Q. Did the judge sign the order while you were standing at his bench there?

A. Well, the judge signed the papers right there.

Q. While you were standing at the desk?

A. Yes, sir.

Q. And then you think you went up to Rice & Lyon's office?

A. Yes, sir.

Q. And possibly signed some papers up there?

A. I know I signed something, some papers.

Q. Now, was there any auction sale while you were standing there at the judge's desk?

A. No, sir.

Q. Or any bidding while you were in the court room?

A. No, sir; there was nothing said to that effect.

Q. Nobody asked if anybody wanted to bid?

A. No, sir.

Q. How long were you in the court room altogether?

A. Well, we wasn't there very long. Of course, there were one or two parties ahead of us to see the judge and we had to wait until they were through. I don't think we were in there over thirty minutes at the outside.

Q. After the judge signed the paper at his desk how long did you remain in the court room?

A. Just a few minutes.

Q. Who went out with you?

A. Mr. Pitt and the two attorneys.

Q. Was that the only time you were up in the County Court room concerning the sale of this commercial lease, as you term it, or extension lease?

A. It was.

Q. Now, had you any conversation with your son, Albert T., with regard to the guardianship?

A. Yes, sir; we talked it over several times.

Q Before you signed the petition?

A. Yes, sir.

Q. What statements, if any, did he make to you——

The Court: Never mind about that. Do you object to that?

Mr. Davidson: Yes, sir, we object to all this.

The Court: I sustain the objection to that.

Mr. Linebaugh: Will the court permit me to finish my question so as to make my offer?

The Court: No, that is not the rule in the Federal Court.

Mr. Linebaugh: I will ask it this way, if I may, your honor:

Q. Did your son, Albert T., tell you of certain statements which Mr. Pitt had made to him concerning your guardianship?

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: We except.

Q. Mrs. Weldy, the $18,000.00 offer which Mr. Pitt made, what was that for?

A. Well, it was for the making of a commercial lease, he said.

Q. On what properties?

A. On the W. G., Albert T., Jesse L. and Edward C.

Q. That was four separate allotments, were they?

A. Yes, sir.

The Court: He said he would pay as much as $18,000.00 for a commercial lease on these allotments; that is what he meant by an offer, isn't it?

A. Yes, sir.

Q. Now, who, if you know, made—if there was any division of that $18,000.00 made as applying to each of the separate allotments, who made it?

Mr. Davidson: If the court please, we object to that.

The Court: Yes, I sustain the objection. The record shows what was done.

Q. Who, if any person—well, I will ask you this: Prior to the petition being brought to you for your signature by Mr. Pitt, was the method of division and amount of the division of the $18,000.00 discussed and agreed upon between you and Mr. Pitt?

Mr. Davidson: We object to that; wholly incompetent.

The Court: I sustain the objection.

Q. Was any separate price ever suggested by Mr. Pitt or agreed upon between the two of you as to the separate allotments?

A. No, sir.

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: Exception. That is all.

Cross Examination by Mr. Davidson.

Q. You say you had no lawyer?

A. I didn't have anyone representing me at that time.

Q. Did you have a man named Robertie?

A. I didn't at that time.

Q. You didn't go to see him?

A. No, sir.

Q. You didn't go to see him?

A. No, sir.

Q. He was your attorney?

A. Yes, sir.

Q. Didn't you employ L. J. Martin?

A. Not in this.

Q. Didn't L. J. Martin go up to the court with you the time Judge Ramsey had this hearing?

A. If he did, I do not remember it.

Q. You never employed Mr. Martin?

A. Mr. Martin did do work for me.

Q. When, after that or before that?

A. Well, before and some after that. He made the final reports for the two children when they became of age.

Q. Do you say now you didn't go with Robertie or Martin?

A. No, sir.

Q. You didn't go to any attorney at all?

A. Mr. Pitt came down and we had the talk and he said it won't be necessary for you to pay any attorney fee.

Mr. Linebaugh: Won't you let her complete her answer?

The Court: I excluded that because it is not responsive to the question.

Q. You signed this petition and swore to it, didn't you?

A. Yes, sir.

Q. Over six years ago?

A. Well, it was when the lease was being made.

Q. And there has been nothing to prevent your coming to court with this matter within the last six years?

A. The children, when they became of age, took it up.

Q. But you still represent three minor children?

A. I do.

Q. You have an interest in William G. Twist's land as his widow?

A. I have a third interest.

Q. And you are getting your share of the one-eighth royalty from that lease?

A. Yes, sir.

Q. And have been all the time?

A. Yes, sir.

Q. And you have filed no suit for yourself?

A. I have filed no suit.

Mr. Davidson: I believe that is all.

Redirect Examination by Mr. Linebaugh.

Q. Mrs. Weldy, why didn't you get an attorney in these proceedings?

A. Well, I don't know, only just I didn't, and Mr. Pitt said he didn't think it would be necessary, they would take care of that.

The Court: He told you that he had an attorney?

A. He didn't come right out and say that; he just said they would take care of that.

The Court: Said they would have the papers fixed up?

A. Yes, sir.

Recross Examination by Mr. Davidson.

Q. There was an agreement there wasn't there that this royalty was to be increased from 10% to 12½%?

A. There was.

Q. And that was part of the consideration?

A. Yes, sir.

Q. And ever since that time an eighth royalty has been paid?

A. Yes, sir.

The Court: How long before the fifteen-year lease had expired when this agreement was made?

Mr. Linebaugh: About two years, your honor. (R. 44-53.)

The court did not by its decree affirmatively find that there was no fraud but it did unequivocally state its conclusions upon the subject in ruling upon the evidence introduced, or offered to be introduced by the plaintiffs.

The assignments of error, as the Circuit Court of Appeals said, disclose that the claim is made by petitioners that the court erred *(1)* in admitting evidence, *(2)* in excluding evidence, *(3)* in refusing to enter judgments for plaintiffs, *(4)* in making findings not supported by the evidence, *(5)* in refusing to make other findings.

The only exceptions to the rulings of the court on the admissibility of evidence was in two instances, namely: they offered to prove by Mrs. Weldy that during the negotiations between her and Los Angeles Cherokee Oil Company for the extension of the lease, Mr. Pitt and Mr. Anderson, its representatives, avowed their willingness to become sureties on her bond as guardian if she would sign a petition to the court for an extension of the lease (R. 47), and

the refusal of the court to permit Mrs. Weldy to testify as to conversations she had with her son, Albert T. Twist, with regard to the guardianship prior to the time she signed the petition for an extension of the leases (R. 50, 51). The assignments of error do not go to these specific rulings.

The argument in support of the claim of fraud is substantially: that Pitt and Anderson, the representatives of Los Angeles Cherokee Oil Company, became Mrs. Weldy's bondsmen in Mrs. Weldy's guardianship case for the purpose of influencing her decision to petition the County Court to approve the extension of the leases; that they stated to her that the amount proposed to be paid was more than the leases were worth, and that she would not be doing right to reject the offer, and that the County Court would not look favorably upon such refusal on her part, and that she was led to fear that the County Court might remove her and place the affairs of her children in the hands of strangers. All this is urged in support of the allegation that the extension of the leases was procured by the "fraud, duress and false dealing of Los Angeles Cherokee Oil Company."

It is not necessary to argue here that this does not amount to fraud or duress, even if Mrs. Weldy was the sole judge of the expediency of extending the term of these leases. So far as her rights as the widow of William G. Twist are concerned she is making no complaint, and has instituted no suit in her own behalf. As to the rights of her wards the probate court is the tribunal to determine whether it was for their best interests to have the terms of these leases extended. That court could have made such an order upon the petition of the lessees even if the guardian had refused to file a petition for that purpose, if it was con-

vinced that such extension was for the best interests of the ward. The Oklahoma statute gives the probate court making the appointment of a guardian "exclusive jurisdiction to control him in the management and disposition of the person and property of his ward." (Section 6583, Compiled Laws, 1921.) No fraud is alleged, or attempted to be proven, as having been perpetrated upon the court. As we have seen, the expediency of extending the leases was submitted to the probate court having jurisdiction of the guardianship of the minor lessors, and the court approved such extension. These suits, so far as they are based upon fraud in procuring the extension, are a collateral attack upon the judgment and order of the probate court.

By her petition filed in the probate court Mrs. Weldy, as guardian, represented that the original leases were made for a definite period, without proper regard for the best interests of the lessor and lessee. She set out the condition of the leases, the amount of oil being produced from each lease, the amount of oil accruing to the lessors, to-wit, ten per cent of the oil produced, and that Los Angeles-Cherokee Oil Company had offered to increase the royalty from ten per cent to twelve and one half per cent, and to pay to her for the benefit of herself and her wards, as their interests in the land may appear, an agreed sum of money, and praying that she be permitted to enter into an agreement to extend the term of each of said leases for a period so long as oil or gas shall be found therein (R. 10, 11). There is no intimation that any of the statements in that petition were untrue. The order of the probate court, pursuant to the notice and hearing, recites, as we have already shown, that the court heard evidence and found and approved the consideration for such extensions, and that the proposition was bene-

ficial and for the best interests of the minors. We must assume, in this suit, that the probate court performed its full duty and made such investigation as it deemed proper and necessary in order to determine whether the consideration was adequate and whether the extensions of these leases was for the best interests of the wards. Its orders and judgment in the premises cannot be collaterally impeached. There is no allegation or intimation that the Los Angles Cherokee Oil Company did not perform the conditions of the extensions approved by the court, or that the bonus money was not paid, or that the royalties were not increased, or that the wells were not drilled.

Petitioners indulge in many fine-drawn criticisms of the proceedings, which criticisms appear to be rather an afterthought, and not the basis of attack upon the transaction by the pleadings. They complain that the $18,000.00 was prorated according to the production of the different tracts, and that this was an arbitrary agreement without regard to the value of the extensions and could not determine their value, and say that such an arrangement does not take into consideration the number of wells on each tract, the age and condition of each well, and the extent of the undeveloped acreage on each tract. But there is no evidence as to the proper method of determining the value of the rights acquired by Los Angeles Cherokee Oil Company. So far as the proof is concerned, the parties, and the probate court, may have taken into consideration the very data suggested by petitioner. The fact that a lump sum of $18,000.00 was offered as a bonus, instead of so much for each extension, is no evidence of fraud or unfair dealing. In effect the Los Angeles Cherokee Oil Company made a bid of so much for each extension according to the basis of di-

vision agreed upon, aggregating $[illegible], and which was approved by the court.

Petitioners also claim that the bonus of $[illegible] was the sole consideration. But this is not true, and indeed it may have been the least important. One of the motives inducing the sale may have been the fact that if the leases had not been extended the lessee could remove its equipment, for, of course, it could not have been compelled to sell that equipment to any other lessee. The removal of such equipment, it is obvious, would injure the wells on the land, possibly irreparably. An extension of the lease to the same operator would obviate that danger. The discrepancy between the bonus paid for the extension and the price later paid for an assignment of the extended leases by Los Angeles Chevalier Oil Company to The Prairie Oil & Gas Company, if material at all, can be explained by the circumstance that The Prairie Oil & Gas Company bought the whole property, including the lessee's equipment, which, of course, could not have been taken into consideration in estimating the value of the extension. The value of a lease with the operating equipment in place and being used, is one thing; the value of the same lease, dismantled of its operating equipment, is quite a different thing. Certainly The Prairie Oil & Gas Company had the right to assume that the probate court, in approving the extension, had determined the adequacy of the consideration. Surely it was not bound to inquire whether fraud had been practiced on the court in obtaining its judgment. The estimate of the oil still recoverable from the land is a matter of speculation at best; the probability of new oil sands, which may be indicated by the drilling of new wells, either on the leased tract or upon adjoining land, different or improved methods of extraction,

the skill and experience of the operator; and, it may be, greater economy in management, wider knowledge of markets, and better marketing facilities, are all to be taken into account in arriving at the price which the purchaser is willing to pay for a producing lease. Indeed there are too many elements to be considered in determining the prospective value of an oil and gas mining property at a given time—fluctuating as such values must necessarily be—to make the mere fact of a discrepancy between a price paid to a land owner for an extension of the fixed term of an existing lease, and that paid eight months later for the whole interest and estate of the lessee, any criterion whatever on the question of fraud based on inadequacy of consideration. The argument as to the comparative amount of production, and the current market price of oil, at the two periods, is too narrow in its scope and is wholly insufficient as a predicate for the cancellation of these extended leases on the ground of fraud. As this court has said in *The Atlantic Refining Company v. Bowne*, 94 F. [illegible]:

> "Cancelling an executed contract is an exercise of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear."

In *Mercer Land Trust v. [illegible]*, 121 F. [illegible], this court said:

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to restrain written instrument for fraud or a mistake in the execution of the written instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and it cannot be done upon

a bare preponderance of the evidence which leaves the issue in doubt."

The court further said:

"If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the Government of the United States under its official seal."

And so we say in this case that the doctrine is all the more applicable to an attempt to cancel a completed contract, approved and confirmed by a court which had complete jurisdiction of the subject matter and the parties involved.

Counsel say that the agreement to drill an additional well on each of the leases within six months, was no consideration because that was an agreement to do that which they were already bound to do. In this they are mistaken. The lessee in an oil and gas lease is bound, within the time prescribed in the lease, to drill at least one well, and that is because of his duty to explore the land by such means. But upon the discovery of oil he is under no obligation to continue the drilling of other wells unless they would be profitable.

Brewster v. Lanyon Zinc Co., 140 Fed. 801;
Watchorn v. Kansas Pet. Co., 5 Fed. (2d) 636.

The absolute promise to drill an additional well on each of these leases within six months, whether conditions then indicated a loss to the lease owner and a benefit only to the owner of the land, can hardly be said to be no consideration.

It is also said that the increase in royalty was "but another subterfuge and pretended consideration" because the leases were governed by the regulations of the Department of the Interior, and that such regulations prescribed that after May 1, 1908, the maximum rate of royalty shall be twelve and one-half per cent. But while these leases were under the jurisdiction and supervision of the Department of the Interior at the time they were originally executed, it is obvious that at the time of the proceedings in the probate court the Indian lessors and their allotments had been released from Departmental control, for, otherwise, it would have been necessary to have the Department approve the modification of the leases, and the extension of the terms, and no such claim is made.

Even if the allegations of the complaints and the proof offered in support of them amount to fraud, such fraud was intrinsic. It inhered in the judgment of the court. What the court had to determine was the necessity or expediency of the extensions; whether it would be for the best interests of the wards to have that done; and whether the offer made for the extensions of the leases was an adequate consideration for such privileges. The probate court determined these matters upon the hearing. They were necessarily the subject of its investigation. The judgment must be regarded as the deliberate act of the court. (*Weaver* v. *Van de Venter*, 19 S. W. 889.) That the guardian may have been induced to sign her petition, if that be true, by the promise of the lessee's representatives that they would become sureties on her bond, surely bears no resemblance to fraud. Their statement that the court might remove her if she did not consent to such extension, and that she did not need an attorney, are perfectly consistent with good

faith on their part, and the fraud must be such as to be utterly repugnant to honest intentions. (*Hardeman* v. *Donaghey*, 54 Sou. 172.) In any case these representations were not sufficient to vitiate the judgment, for the probate court determined that the guardian's action in the premises was the right and proper thing to do. A judgment can only be set aside for fraud when the proof of it is clear and convincing, and when the fraud is the basis of it, and but for which fraud it would not have been rendered.

Holton v. *Davis*, 108 Fed. 138;
Doughty v. *Doughty*, 27 N. J. Eq. 315;
Boyden v. *Reed*, 55 Ill. 458;
Ely-Walker Dry Goods Co. v. *Smith*, 160 Pac. 898;
Ray v. *McKnight*, 183 Pac. 489;
Hardeman v. *Donaghey*, *supra*.

In *Scott* v. *Gupsy Oil Co.*, 239 Pac. 887, it was held by the Supreme Court of Oklahoma that the question of the inadequacy of the purchase price of a lease of a minor's lands was an issue involved in the course of the proceedings for the sale, and that the judgment of confirmation precludes inquiry into the subject in a collateral proceeding. The court in its opinion said:

> "This court, in numerous cases, has held that the sale of a minor's interest in real estate, the determination by the County Court of the necessity therefor, and the adequacy of the consideration, are conclusive in a collateral proceeding, in the absence of fraud extrinsic to the record, and are impervious to collateral attack, and the scope of inquiry in a collateral attack is confined to the consideration as to whether the County Court had jurisdiction of such proceedings. *Welch* v. *Focht*, 67 Okl. 275, 171 P. 730, L. R. A. 1918 D, 1163;

Tiger v. *Drumright, supra.* To the same effect: *Brown* v. *Trent*, 36 Okl. 239, 128 P. 895; *Bowling* v. *Merry*, 91 Okl. 176, 217 P. 404; *Crabtree* v. *Bath*, 102 Okl. 1, 225 P. 924."

In *Brooks* v. *Tucker*, 201 Pac. 645, the same court said in respect to the duty and power of a probate court in that state:

> "The law contemplates that the court must be satisfied from credible testimony adduced on the hearing of the return of the sale that the same has been conducted in accordance with the statutes and a fair value paid for the property, and the decree confirming the sale is a solemn judgment of the court vouching for the truthfulness of all of the essential facts necessary to constitute a valid sale. Purchasers in dealing with this class of land have a right to assume that the court has faithfully performed his duty."

In *Harrell* v. *Prairie Oil & Gas Company, supra*, the Circuit Court of Appeals said with reference to the sale of an extension of a lease claimed to have been given for a grossly inadequate price:

> "But conceding for the sake of argument that the lease was worth a great deal more than appellee's bid, that fact standing alone did not entitle appellant to a decree. The sale of the lease on June 19, 1916, was a judicial sale by a court having plenary jurisdiction over the parties and the subject matter. *Crabtree* v. *Bath*, 102 Okl. 1, 225 P. 924; *Abraham* v. *Homer*, 102 Okl. 12, 226 P. 45; *Tucker* v. *Leonard*, 76 Okl. 16, 183 P. 907; *Thaw* v. *Falls*, 136 U. S. 519, 548, 10 S. Ct. 1037, 34 L. ed. 531. That sale was confirmed by the court, and it is the established rule that after confirmation there can be no cancellation of the sale solely on the

ground that the price bid was inadequate. In *Morrison v. Burnette*, 154 F. 617, 624, 83 C. C. A. 391, 398, this court said:

> 'Hence the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids'."

V.

But respondent asserts by its answer that it is a bona fide purchaser. In its answer it alleges that at the time of its purchase of the assignment of these leases from the Los Angeles Cherokee Oil Company on March 5, 1917, it paid to it more than a thousand dollars; that the consideration was bona fide and actually paid; that at the time of paying the consideration and at the time of the delivery thereof it had no notice or knowledge of the various transactions and representations alleged and set forth in the petition of the plaintiffs between its assignor and their guardian, and had no notice and knowledge of any proceeding and transactions relative to the modification and extension of said leases other than as shown by the records of the proceedings in the County Court of Tulsa County, Oklahoma, and avers that its purchase and the payment of the consideration was in reliance upon the apparent legal title of the Los Angeles Cherokee Oil Company as shown by the public records. (R. 31.)

It was admitted on the trial that Dana H. Kelsey, who was unavoidably absent, would, if present, testify that he acted for the Prairie Oil & Gas Company, in connection with Fred S. Cook, and conducted the negotiations for the purchase from the Los Angeles Cherokee Oil Company of these Twist leases with other leases; that there was paid for them the following sums: For the William G. Twist lease, $112,561.61; for the Edward C. Twist lease, $49,377.38; that at the time of completing such purchase and paying the moneys and taking the assignments "he had no notice or knowledge of the transactions alleged by the petitions to have occurred and alleged to have taken place between the officers or agents of the Los Angeles Cherokee Oil Company and Leoria L. Twist (Mrs. Weldy), guardian, in connection with the agreement to extend the leases, but that he purchased these leases on behalf of the Prairie Oil & Gas Company subject to an examination of the abstracts furnished the Prairie Oil & Gas Company, and that in such transaction H. B. Anderson and a man by the name of Pitt represented the Los Angeles Cherokee Oil Company, and that neither of said persons referred to or informed him concerning any matters, conversations or transactions between the Los Angeles Cherokee Oil Company and its representatives and Leoria L. Twist Weldy." (R. 39-40.) Counsel criticise the stipulation as insufficient to support the plea of bona fide purchaser. They say that there is no evidence in the record that Fred S. Cook was unaware of the nature of the transactions or of the conversations between Pitt and Anderson and the guardian. But the stipulation was that Dana H. Kelsey was the representative of the Prairie Oil & Gas Company. What Fred S. Cook's connection was with that transaction, is not disclosed, and we

therefore cannot assume that even if he knew of these conversations and transactions his knowledge would bind the Prairie Oil & Gas Company. But the real criticism of counsel is that the known facts were sufficient notice that "some improper activities had existed" because the Prairie Oil & Gas Company knew that it was paying very much more than the $18,000.00 which had been paid for the extension of these leases seven or eight months before, and that therefore with this positive knowledge of the discrepancy in the prices paid it could not contend that it was in the exercise of good faith. We have already called attention to the fact that the price paid by the Prairie Oil & Gas Company to the Los Angeles-Cherokee Oil Company was for the whole property, including the equipment and that such discrepancy is not a criterion for determining the existence of fraud. Furthermore, the probate court in approving the transaction necessarily determined the adequacy of the consideration. Was it the duty of the Prairie Oil & Gas Company to make inquiry whether fraud had been practiced on the court? As said in *Meehan* v. *Williams*, 48 Pa. St. 238, "what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell."

In *Wilson* v. *Warr*, 6 Wallace 83, this court said:

> "The question when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence."

This court also said in *Townsend* v. *Little*, 109 U. S. 54:

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted."

Respectfully submitted.

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No. 302

In the Supreme Court of the United States

October Term, 1926.

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *NEE* TWIST, *Petitioners,*

VERSUS

THE PRAIRIE OIL & GAS COMPANY, *Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

THOMAS J. FLANNELLY,
A. A. DAVIDSON,
Attorneys for Respondent.

WEST, GIBSON, SHERMAN,
DAVIDSON & HULL,
Of Counsel.

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The decision of the Circuit Court of Appeals that the remedy of the petitioners at law was adequate, and that a court of equity would not, under the facts pleaded, grant the equitable relief prayed for, should be upheld. 1

Propositions of Petitioners. 6

Propositions of Respondent. 7

I. The requirements of Rule 9 of the Probate Rules promulgated by the Justices of the Supreme Court of Oklahoma, were substantially complied with in respect to obtaining the extension of the term of the mining lease involved. 8

II. *(a) Carlile* v. *National Oil & Development Company* and *Winona Oil Co.* v. *Barnes*, decided by the Supreme Court of Oklahoma, are ineffective to deprive the respondent of its vested rights acquired at a time when there was no decision on the point as to the effect of such rules upon the jurisdiction of probate courts, and this court has the right to determine for itself the effect of a violation of such rules. *(b)* The order and judgment of the probate court approving the transactions involved, made in the exercise of a jurisdiction recognized by the state Supreme Court in its prior decisions, was valid, and under the rule of such decisions a right of property vested in the respondent by its contract of purchase of the extended leases herein involved. 15

III. Failure to comply with said Rule 9 in obtaining the lease extensions was not a jurisdictional defect, as the Probate Rules referred to were rules of pro-

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cedure merely, not affecting the constitutional and statutory authority of the probate courts of Oklahoma in respect to the transactions involved, and were ineffective to render void for non-compliance therewith the judgment of such court acting within its jurisdiction in respect to a completed transaction wherein the rules of procedure were not invoked by either of the interested parties, and were thereby waived. 103 104

IV. *(a)* The proof fails to show fraud in procuring the order and judgment of the County Court or to substantiate the allegations of fraud and unfair dealing in respect to the modification of the lease contract. *(b)* The fraud claimed is, if fraud at all, extrinsic fraud, and the judgment and order of the probate court is conclusive in this proceeding. . . . 53 54

V. The Prairie Oil & Gas Company is a bona fide purchaser for value and without notice of the alleged fraud. 82

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1926.

No. 302

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *NEE* TWIST, *Petitioners,*

vs.

THE PRAIRIE OIL & GAS COMPANY, *Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* RESPONDENT.

The decision of the Circuit Court of Appeals that the remedy of the petitioners at law was adequate, and that a court of equity would not, under the facts pleaded, grant the equitable relief prayed for, should be upheld.

The view taken by the Circuit Court of Appeals, briefly stated, is that the petitioners' cause of action is predicated upon the proposition that the leases under which respondent took possession of the lands were ended, and that it was a trespasser, the contract and stipulation extending the term of the leases being void and ineffective for that purpose; that the remedy at law which they had invoked

was adequate; that a federal court could not grant the relief of quieting title as prayed for because petitioners were not in possession and the respondent was in possession of the land; that the decree of the court was in effect a judgment at law, upon the issues involved, in favor of respondent, and that though brought to the appellate court by appeal, that court would treat it as if upon writ of error and would decide accordingly, but only upon the issues arising under the process, pleading and judgment, the trial being to the court without a jury, but without an express waiver thereof.

The authorities cited by the court seem ample to sustain its conclusions, and are not answered, we submit, by statements that the relief prayed for is equitable in its nature, and that a court of equity may dispose of the whole case and grant complete relief even if such relief be of the kind conferred by a court of law.

The petitioners' first cause of action was predicated on their ownership of land. They allege the execution of an oil and gas lease, which had expired at the time of the institution of the suit, and that the respondent was taking oil and gas from the land, and which is equivalent to an allegation that it was in possession.

—*Cosmos Exploration Co.* v. *Grey Eagle Oil Co.*, 112 Fed. 4

Petitioners were claiming the legal title on the ground that the attempted extension of the term of such leases was void. In such a case the remedy is at law.

—*Hart* v. *Hollingsworth*, 100 U. S. 100;
United States v. *Wilson*, 118 U. S. 86.

The so-called second cause of action merely reiterates the allegations of the first, no new facts being set up, but upon the same facts petitioners pray that their title be quieted.

The action of the petitioners, as disclosed by the pleadings, is really one of trespass for the wrongful removal and conversion of oil and gas from the land, as the recovery of a money judgment by way of damages is sought, and there being no question of respondent's financial responsibility, the remedy at law is adequate, and equity will not entertain the case notwithstanding averments of fraud in the petition.

—*United States* v. *Bitter Root Development Co.*, 200 U. S. 451

It is pointed out that the relief of cancellation of the contract extending the term of the leases was asked, and that the granting of this relief is not dependent on possession. It is apparent, however, this is merely a method of quieting title, for the suit is not predicated on rescission of the contract with the right to have same made effective, as a matter of record, by decree. Had the suit been of that character, petitioners would have been required to restore, or offer to restore, the consideration admittedly received under the contract. This, we understand, is the universal rule in equity, and is the requirement of the Oklahoma statute. (Sec. 5079, Laws 1921.) No such offer was made in the pleadings or proof, and attention is called to this omission for the purpose of emphasizing the view of the Circuit Court of Appeals that the suit was one to quiet title and not one predicated on rescission and cancellation. Furthermore, the petitioners asked for damages against a defendant presumably solvent, and were not entitled to the rem-

edy of cancellation without showing how they would sustain future injury by not having the contract of extension cancelled, or how the same, unless cancelled, would be a menace to the petitioners, or that there was danger that it would be used, tortiously or oppressively by the respondent to their injury; in other words, without showing how the remedy at law, which they had invoked, was not adequate. The judgment for damages would have been adequate, and moreover would have been conclusive of the rights of the parties, and could be pleaded as an adjudication against any claim of the respondent under the extended leases.

It is pointed out that respondent invoked equitable relief and is thereby concluded on the question under discussion. The answer of respondent called attention to the judicial proceedings resulting in the contract of extension of the term of the leases and its approval by the court as shown by the petition and its exhibits, and denied that the same were ineffective to extend the terms of the leases as charged in the petition. It admitted respondent's possession of the land, and that it was taking oil and gas therefrom, denied the charge of fraud, and set up that it was a bona fide purchaser of the extended leases, and asked that its title thereto be quieted. Are sections 274 A and 274 B of the Judicial Code applicable to that situation as claimed? Section 274 A relates only to the power of a court to order an amendment of the pleadings if the parties see fit so to do, in order that the same might be proceeded with on the proper side of the docket. *Waldo* v. *Wilson*, 231 Fed. 654. The fact that the cause here was proceeded with on the equity side and that the judgment was in the form of a decree is not conclusive, for the court found all the issues for the respondent, and its real judgment was that respondent was

the owner of oil and gas leases upon the lands involved (see decree). (*Ewert* v. *Robinson*, 289 Fed. 740.) Such a judgment would be equivalent to quieting respondent's title, and the mere fact that such relief was granted on its request did not operate to convert the action into a suit in equity.

Section 274-B merely permits equitable defenses in an action at law. *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, is cited in support of the claim that the respondent's answer made the case an equitable one. There, however, the cause of action was at law for money had and received. Defendant admitted its liability for the money, but averred that it held the same as a stake-holder, and that others, besides the plaintiff, were claiming it, and therefore offered to pay it into court and prayed that the other claimants be made parties so that the question of ownership might be litigated as between them. The answer of the defendant set up an entirely different set of facts, which changed the issues so that the proceeding thereby became an equitable one, an interpleader under section 274-B. Surely that could not have been the result of respondent's answer in the instant case unless it had admitted the allegations of the petition and that the sole issue in the trial had been upon its plea of bona fide purchase. We take it that the equitable defenses referred to in section 274-B relate to equitable *remedies*, such as reformation, cancellation, etc., which were always available to a defendant against whom there exists an admitted legal liability. The word defense is the significant word signifying something which simply defeats recovery in an action or suit and not something by means of which the defendant can have independent relief. Pomeroy's Code Remedies, paragraph 27.

The conclusion of the Circuit Court of Appeals that the primary relief was at law and furnished an adequate remedy—the equitable relief demanded being incidental only, *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25—and that it was immaterial that the real judgment was, by common consent, in the form of a decree, appears to be sound in principle. It is not a question of waiver or failure to object to the procedure; it is a question of whether the petitioners have the right to insist that the primary and principal relief demanded by them was equitable and that they were entitled to such relief upon the face of their petition. The construction of that petition by the Circuit Court of Appeals puts the petitioners in the attitude of asking the trial court to adjudge and determine whether the respondent was a trespasser and was wrongfully removing oil from their lands, and if so, to award them damages for such wrongful conversion, and, as an incident to such recovery, declare by a decree the invalidity of the lease extensions. The petitioners are insisting, however, that the allegations of fraud and non-compliance with Rule 9 made the main cause one for equitable relief, with damages as an incident. The authorities would appear to sustain the view of the Circuit Court.

On the merits the two propositions advanced by petitioners are:

> *First.* That the extension of the term of the leases on June 16, 1916, was not made in accordance with the provisions of Rule 9 of the probate rules promulgated by the justices of the Supreme Court of Oklahoma, and that therefore the probate court in approving such extensions acted without jurisdiction.
>
> *Second.* That the extension was obtained by fraud

and unfair dealings and for a grossly inadequate consideration.

Under the first proposition there is presented a question of public interest, *viz:* whether the highest court of a state, or the judges composing that court, may, under statutory authority to make general rules to carry out the provisions of the state code, prescribe a rule regulating the procedure of inferior courts of general jurisdiction so as to nullify their judgments in respect to matters within such jurisdiction because of non-compliance with a rule so prescribed, and whether this court is bound by the decision of the state Supreme Court that the judgment of such inferior court rendered without an observance of the rule is void for want of jurisdiction and retroactive in its effect.

On the merits of the case as a whole it is the position of the respondent:

1. **The requirements of Rule 9 of the Probate Rules promulgated by the Justices of the Supreme Court of Oklahoma, were substantially complied with in respect to obtaining the extension of the term of the mining lease involved.**

2. **(a)** ***Carlile*** **v.** ***National Oil & Development Company*** **and** ***Winona Oil Company*** **v.** ***Barnes,*** **decided by the Supreme Court of Oklahoma, are ineffective to deprive the respondent of its vested rights acquired at a time when there was no decision on the point as to the effect of such rules upon the jurisdiction of probate courts, and this court has the right to determine for itself the effect of a violation of such rules.**

(b) The order and judgment of the probate court approving the transactions involved, made in the exercise of

a jurisdiction recognized by the state Supreme Court in its prior decisions, was valid, and under the rule of such decisions a right of property vested in the respondent by its contract of purchase of the extended leases herein involved.

3. Failure to comply with said Rule 9 in obtaining the lease extensions was not a jurisdictional defect, as the Probate Rules referred to were rules of procedure merely, not affecting the constitutional and statutory authority of the probate courts of Oklahoma in respect to the transactions involved, and were ineffective to render void for non-compliance therewith the judgment of such court acting within its jurisdiction in respect to a completed transaction wherein the rules of procedure were not invoked by either of the interested parties, and were thereby waived.

4. (a) The proof fails to show fraud in procuring the order and judgment of the County Court or to substantiate the allegations of fraud and unfair dealing in respect to the modification of the lease contracts.

(b) The fraud claimed is, if fraud at all, extrinsic fraud, and the judgment and order of the probate court is conclusive in this proceeding.

5. The Prairie Oil & Gas Company is a bona fide purchaser for value and without notice of the alleged fraud.

I.

Before discussing the questions of law involved in the petitioner's first proposition we desire to call the court's attention to the proceedings in the probate court resulting in the order and judgment herein assailed, and from which, we think, the conclusion may fairly be drawn that the re-

quirements of the rule referred to were observed so far as they could apply to a transaction not within the express terms of the rule itself. That rule provides that no oil and gas lease covering the lands of infants under guardianship will be approved "except after sale in open court to the highest and best responsible bidder," and that "notice of such sale must be given by posting and by publication, where publication is practicable."

The record shows that notice was given; that Mrs. Weldy, as guardian of her minor children, and as administratrix of the estate of William G. Twist, deceased, gave notice that she would "sell at public sale to the highest bidder, subject to confirmation of said court, on Friday, the 16th day of June, 1916, at 10:30 o'clock A. M., in the County Court room in the City of Tulsa, Oklahoma, an extension of oil and gas mining lease now covering the following described tracts of land in Tulsa County, State of Oklahoma, to-wit:" (Describing the tracts of land covered by the four leases.) (R. 26.) This notice was posted on June 5, 1916, in three public places in Tulsa County (R. 28), which was in compliance with the order of the County Court (R. 12). On June 16, 1916, the guardian and administratrix made a sworn report that she had executed to the Los Angeles-Cherokee Oil Company an extension of the terms of the four leases "for a period from the date of the expiration of each of said present leases for so long as oil and gas should be produced" and for a total cash bonus of $18,080.00, and increase in the amount of royalty from ten per cent to twelve and one-half per cent of the oil produced and saved from the premises (R. 13-14). On the same day the court made an order reciting that it had heard the petition, witnesses, and statement of counsel, and reciting the

consideration for the extension to be "the sum of $18,000.00 in cash, and an increase of the royalty on each lease from ten (10%) per cent to twelve and one-half (12½%) per cent, effective forthwith, and the drilling of a well on each of said tracts within six months from this date," and finding "that said proposition is beneficial and for the best interests of said minors and that the same should be approved." The approval is in the following language:

> "It is further considered, ordered and adjudged that the court having examined said agreements extending the terms of said leases, does hereby approve and confirm the same, and does approve and confirm the extension of said leases for a term so long as oil or gas shall be found thereon." (R. 15-16.)

There is nothing to indicate, and Mrs. Weldy offered no evidence, that anyone had made a better offer than the Los Angeles-Cherokee Oil Company had made her. It was therefore the highest and best bidder in the absence of any proof that other persons offered or made a better or higher bid.

Counsel for petitioners have not pointed out wherein the proceedings failed to comply with the requirements of Rule 9, except to urge certain "irregularities," which, in effect, are that the proceedings related merely to the approval of an agreement which the guardian had made with the Los Angeles-Cherokee Oil Company—the lessee under the existing leases—and not to a sale of an extension of the terms of such leases. If Rule 9 applied to the situation at all, the court must be impressed with the difficulty of applying it to the case of a proposed extension of the term of an existing lease. This difficulty was recognized by the Supreme Court of Oklahoma in the two cases cited by petitioners in

support of their contention that the extension of the terms of these leases was void (*Winona Oil Co.* v. *Barnes; Carlile* v. *National Oil & Development Co.*). In the *Carlile* case it was said:

> "The defendant in error suggests in their brief that it would be a vain and useless thing for the court to put up at public auction, during the term of a lease, the question of the extension and modification of the old lease, for the reason that no one would bid on such an interest but the old lessee, due to the interest of the old lessee still subsisting."

And in reply to that contention the court said:

> "The trouble with such a contention is that it involves a suggestion of a reason why a court, in the exercise of its discretion, and with due regard to the interests of the ward, should not make an order allowing a sale or an extension under such conditions, but if, in any case, the County Court, in his discretion, concluded it was the best interests of the minor that it be done, there is no reason why there could not be at least *a reasonable compliance with the procedure laid down in Rule No. 9. It might result in a vain thing and result in the same thing as has resulted in the instant case. But it would result in a sale, judicial in its nature, and the rights of the minor would at least be protected by an opportunity for open and public bidding, and the purposes of the law satisfied.*"

The extension of the lease in that case was made without notice of any kind, and it was admitted that the result might have been no different even if public notice *had* been given, but that in such event the rule would have been obeyed and the court would then have been powerless to strike down the result of obedience to its own mandate or

the mandate of the judges composing the court, who, as such, promulgated the rule.

In *Harrell* v. *Prairie Oil & Gas Co.*, 8 Fed. (2d) 236, the question of the extension of an existing lease at a time when Rule 9 was in force, was involved. The requirements of the rule as to publication, etc., were complied with, and the lessee was the purchaser at the sale. It was contended that the probate proceedings were ineffective to extend the lease because, among other things, they

> "failed to state, either in the petition of the guardian to sell the new lease, or in the order authorizing its sale, or in the notice of sale, whether the proposed lease would take effect immediately upon its approval by the court or at the end of the term of the then existing lease; that the purpose of the sale and lease would be a cloud upon the title of any bidder other than appellee, and the lease to anyone else would not become effective until the expiration of the old lease, thus preventing competitive bidding; that the proceedings were fraudulent in that the notice of the proposed giving of the new lease did not state that the lands then had producing wells thereon."

The argument, however, did not prevail. The court said:

> "There is no statute of the state regulating the procedure in the sale of an oil lease on a ward's lands, but in 1914 the Supreme Court adopted a rule governing the procedure which has been adjudged controlling (*Carlile* v. *National Oil & Development Company*, 83 Okl. 217, 201 Pac. 377), wherein it is provided that such leases must be sold in open court to the highest and best responsible bidder, that petitions for the approval of such leases shall be filed at least five days before the same are to be sold, and that notice of such sale must be given by posting and publication where publi-

cation is practicable. All of these requirements were complied with."

The proceeding in the instant case was an honest and painstaking effort on the part of the probate court to comply with the rule and also to accommodate the notice to the actual facts and circumstances. To have given notice of a sale of a lease would have been misleading. Prospective bidders would not know from such notice that the leases advertised were existing leases, completely equipped and producing oil. Furthermore, a bidder would have to contemplate the dismantling of the leases of their equipment by the Los Angeles-Cherokee Oil Company at the end of the prescribed term, for, of course, it was not obligated to sell that equipment. Prospective bidders were therefore informed by the notice that it was the extension of existing leases which was to be sold. The court wanted to be advised, of course, as to the expediency of extending the term or permitting the leases to expire with all the consequences which might result from dismantling them of their operating equipment at that time, and consequently gave notice that it would hear any objection as to why the leases should not be extended. To urge that a private arrangement or contract between the lessee and the guardian and administratrix had already been made, is beside the point. That agreement had no validity unless the court approved it. If anyone had appeared pursuant to the notice and had offered a better arrangement than the proposition of an extension of the existing leases, or had made a better offer for such extension, all of which was the object of giving the notice, and of which there would have been no necessity except for the rule, the court, we must assume, and in accordance with its duty to protect the interests of the

ward, would have adopted it. It has never been the opinion of the writer that the rule applied to the extension of the term of an existing lease, a matter involving merely the modification of the original lease, which is not a sale, but a contract for the use, of property. (*Papoose Oil Co.* v. *Swindler*, 221 Pac. 507.) In the very nature of things the proceedings to obtain the extension could only be a compromise between the actuality and the rule required to be observed. The question of modifying the original contracts was addressed to the discretion of the probate court which has jurisdiction over a minor ward and his estate until he arrives at majority.

—*Ozark Oil Co.* v. *Berryhill*, 143 Pac. 173.

That view has support in *Ardizzone* v. *Archer*, 160 Pac. 446, which, by clear inference, holds that the modification of an oil and gas lease, with the consent of the probate court, is binding. There was in the instant case a formal compliance with the rule as to notice. The fact that there was no "publication" of the notice in addition to its being posted in three public places, is immaterial. Rule 18 of the same rules provides:

> "All advertisements not required by law may be waived with the consent of the County Court upon the approval of the probate attorney or tribal attorney."
>
> —171 Pac., page IX.

The objection that there was no "sale" of the extensions because the probate court did not in terms authorize or direct the sale, is not well taken. The notice given under the rule was specific, namely, that the guardian would "sell at public sale to the highest bidder * * * an extension of an oil and gas mining lease," and the subsequent approval

by the court of the execution of the extended leases to the lessee for the consideration offered by it can amount to nothing else but a sale within the meaning of the rule. We think there can be no doubt, therefore, that the provisions of Rule 9 were complied with, and if so, further discussion of the petitioner's first proposition would seem to be unnecessary.

II.

But even if it were true that the rule had not been complied with and the proceedings did not amount to a sale subject to competitive bidding as held in the *Winona* and *Carlile* cases, it is our contention *(a)* that as there was no decision on this point at the time the rights claimed herein arose, the subsequent decisions of the State Supreme Court were not controlling, and that this court has the right to exercise its independent judgment on the question; and *(b)* that the order and judgment of the County Court made in the exercise of a jurisdiction recognized by the State Supreme Court in its prior decisions was valid, and that under the rule of such decisions a right of property vested in the Prairie Oil & Gas Company by its contract of purchase of such extended leases. In support of these contentions we rely upon:

Kuhn v. *Fairmont Coal Company*, 215 U. S. 349;
Burgess v. *Schuman*, 107 U. S. 20;
Lankford v. *Platte Iron Works*, 235 U. S. 477;
Stanly County v. *Coler*, 190 U. S. 437;
East Alabama Railway Company v. *Doe*, 114 U. S. 340;
Gibson v. *Lyon*, 115 U. S. 439;

Anderson v. *Santa Anna*, 116 U. S. 356;
B. & O. R. R. v. *Baugh*, 149 U. S. 368;
Folsom v. *Ninety-six*, 159 U. S. 611;
Douglass v. *County of Pike*, 101 U. S. 677;
Anderson v. *Santa Anna T. P.*, 161 U. S. 361;
Insurance Co. v. *Debolt*, 16 Howard 415;
Gelpcke v. *City of Dubuque*, 1 Wall. 175;
Havemeyer v. *Iowa Co.*, 3 Wall. 294;
Olcott v. *Supervisors*, 16 Wall. 678;
Taylor v. *City of Ypsilanti*, 105 U. S. 72;
Haskett v. *Maxey*, 33 N. E. 358;
Town of Hardingsburg v. *Cravens*, 47 N. E. 153;
Westinghouse Air Brake Co. v. *Kansas City Southern Railroad Company*, 137 Fed. 26.

In the case first cited, the plaintiff, Kuhn, a citizen of Ohio, sold and conveyed to Camden all the coal underlying a certain tract of land in West Virginia. The deed contained a clause granting unto Camden a . the coal and mining privileges necessary and convenient to the removal of the coal, together with the right to enter upon and under said land, and to mine, excavate and remove the coal, etc. Suit was commenced by Kuhn to recover from the coal company damages arising from the failure of the coal company to maintain proper supports so that the overlying surface was caused to fall. It appears that after this deed was executed to Camden, one Griffin brought an action in a court of West Virginia similar in all respects to this one against the Fairmont Coal Company, which was the successor of Camden. Griffin's rights arose from a deed almost identical with that executed by Kuhn to Camden. The *Griffin* case was decided in favor of the coal company and

the case was appealed to the Supreme Court and an opinion rendered (see 59 W. Va. 480) sustaining the lower court. In the *Kahn* case it was urged that the decision upon this question by the Supreme Court of West Virginia was binding upon the federal court sitting in West Virginia. The case reached the Circuit Court of Appeals which certified this question as to the binding effect of the *Griffin* case to the Supreme Court of the United States where the answer was that the decision was not binding upon the Federal Court, and in passing upon the question the court, in an opinion by Justice HARLAN (HOLMES, WHITE and MCKENNA dissenting), announced a rule covering the whole subject of the effect of decisions of the state court in the Federal Court, and we quote from the opinion the following:

> "We take it, then, that it is no longer to be questioned that the Federal Courts in determining cases before them are to be guided by the following rules: *1.* When administering state laws and determining rights accruing under those laws the jurisdiction of the Federal Court is an independent one, not subordinate to but co ordinate and concurrent with the jurisdiction of the state courts. *2.* Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal Court as authoritative declarations of the law of the state. *3. But, where the law of the state has not been thus settled*, it is not only the right but the duty of the Federal Court to exercise its own judgment, as it also always does when the case before it depends upon the doctrine of commercial law and general jurisprudence. *4.* So, when contracts and transactions are entered into and rights have accrued under a particular state of

> the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the Federal Courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal Court should always lean to an agreement with the state court if the question is balanced with doubt."

In *Lankford* v. *Platte Iron Works*, 235 U. S. 461, which was originally commenced in the Federal Court for the Western District of Oklahoma the question involved was whether a suit against the State Banking Board of the State of Oklahoma was a suit against the state. The principal opinion held that it was, and in reaching the conclusion, prefaced a reference to several decisions of the Supreme Court of Oklahoma with the following statement:

> "Certainly this construction can be given to the Oklahoma statute; and granting that it may admit of dispute an important element to be considered is the decision of the state tribunals."

but nowhere in the principal opinion is there any statement to the effect that the decisions of the state tribunal are binding upon the Federal Court.

A dissenting opinion by Mr. Justice PITNEY, concurred in by Justices DAY, VAN DEVANTER and LAMAR, held that it was not a suit against the state, and we quote the following from the dissenting opinion:

> "We are referred to certain cases in the state court of last resort, one of which, and a very recent

one, bears directly upon the question; and it is frankly conceded that proper deference should be paid to them. At the same time, it is not to be forgotten that this action was brought in the District Court of the United States because of the diverse citizenship of the parties —a ground of jurisdiction especially provided for in the Constitution (Article III, section 2). And, however desirable it may be to preserve harmony of decision between the Federal and the state courts, we cannot, with due regard to our duty, fail to exercise an independent judgment respecting the true intent and meaning of the statute, in the absence of an authoritative adjudication to the contrary *previous to the time that the cause of action arose*. For this plaintiff-appellee is entitled to the enforcement of its contract as it was made; and it invokes a Federal jurisdiction that was established for the very purpose of avoiding the influence of local opinion. *Burgess* v. *Seligman*, 107 U. S. 33, 34; *East Alabama Ry.* v. *Doe*, 114 U. S. 340, 353; *Gibson* v. *Lyon*, 115 U. S. 439, 446; *Anderson* v. *Santa Anna*, 116 U. S. 356, 362; *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 372; *Folsom* v. *Ninety-six*, 159 U. S. 611, 625; *Stanly County* v. *Coler*, 190 U. S. 437, 444; *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, 357, 360."

The foregoing dissenting opinion applies the rule announced in the case of *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, to the construction of a statute and the following cases referred to in the dissenting opinion of Mr. Justice PITNEY also involve the construction of statutes and apply the same rule as that announced in *Kuhn* v. *Fairmont Coal Company, supra*.

Burgess v. *Seligman*, 107 U. S. 20, involved the construction of a statute of the State of Missouri.

Stanly County v. *Coler*, 190 U. S. 437-443, involved the construction of the Statutes and Constitution of North Carolina.

The first syllabus in *Anderson* v. *Santa Anna*, 116 U. S. 356, reads as follows:

> "When at the time of creating and issuing a negotiable evidence of indebtedness of a municipal corporation in a state the highest court of the state has construed the law under which it purports to be issued rights accruing under that construction will not be affected merely by the subsequent decisions of the same courts varying or departing from it."

At page 362 of this opinion the court discusses the rule where there was no decision construing the statute at the time the rights accrued and uses the following language:

> "If, however, we are in error in our interpretations of the decisions in *Cowgill* v. *Long*, *Schofield* v. *Watkins* and *Keithsburg* v. *Frick*, it results that when the bonds were executed there was no decision of the state court in reference to the power of the legislature to enact the Statute of February 28, 1887. In that case the duty of this court is to determine what was the law of Illinois when the rights of the parties accrued."

In *Folsom* v. *Ninety-six*, Folsom brought suit against township ninety-six in the County of Abbeville to recover on bonds of the township issued on March 25, 1886, to aid in building a railroad. In 1888 the Supreme Court of South Carolina held in *Floyd* v. *Perrin*, 30 S. C. 1, and *Whitesides* v. *Neely*, 30 S. C. 31, that the act under which these bonds were issued was unconstitutional and void. It was urged that this decision was binding upon the federal court in the

determination of the case of *Folsom* v. *Ninety-six* but the Supreme Court of the United States held to the contrary and after quoting at considerable length from the case of *Burgess* v. *Seligman*, 107 U. S. 20, uses the following language at page 626:

> "In the case at bar, the Statutes of the State of South Carolina, under which the bonds were issued, were passed in 1882 and 1885. The bonds were issued in behalf of the township and were purchased by the plaintiff, in 1886. It is alleged in the complaint, and admitted by the demurrer, that he purchased the bonds, relying upon their being legal and valid obligation of the township; and that, at the times of their issue and purchase, these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the profession, and by the legislative, executive and judicial departments of the state. And the decisions of the Supreme Court of the state, during the same period, appear to have assumed the validity of such bonds. *Chamblee* v. *Tribble*, and *Carolina Railway* v. *Tribble*, above cited."

And again at page 27:

> "There not being shown to have been a single decision of the state court against the constitutionality of the Act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its views of the law of South Carolina."

We therefore maintain that this court has the right to determine for itself the effect of a violation of Rule 9.

III.

It has long since been settled that under the Constitution and Statutes of the state, County Courts are courts of general jurisdiction with respect to infants and their property.

—*Eaves* v. *Mullen*, 107 Pac. 433;
Scott v. *McGirth*, 139 Pac. 519;
Welch v. *Focht*, 171 Pac. 730;
Holmes v. *Holmes*, 111 Pac. 229;
Baker v. *Carrton*, 150 Pac. 1060;
Hathaway v. *Hoffman*, 153 Pac. 184;
Moffet v. *Jones*, 169 Pac. 652;
Tucker v. *Leonard*, 183 Pac. 907.

Section 11, article 7 of the Constitution provides:

"There is hereby established in each county in the state a County Court which shall be a court of record."

Section 12, article 7, provides:

"The County Court, coextensive with the county, shall have original jurisdiction in all probate matters."

Section 13, article 7, provides:

"The County Court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition and distribution of the estates thereof."

The relevant statutory provisions on this subject are found in sections 3330, 6547 and 6569, Revised Laws of 1910. Section 3330 is a part of the chapter on guardian and ward, and provides:

> "In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

The other two sections are a portion of the chapter on probate procedure. Section 6547 provides:

> "Guardians of infants and insane persons are hereby empowered to lease and grant mineral oil and mineral gas in consideration of a royalty of part or portion of the production thereof and under the same procedure in the County Court as now provided by law where such consideration is money."

Section 6569 provides:

> "The County Court on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders, and give such directions as are needful for the management, investment and disposition of the estate and effects as circumstances require."

The power and authority conferred on guardians and County Courts by the constitutional and statutory provisions of the probate system in Oklahoma, is as great and comprehensive as that found under the constitution or laws

of any state with which we are acquainted. Here, in express language, is conferred on the guardian and the County Court the power to make oil and gas mining leases *without limitation or the hint of limitation as to the term of the leases*, without limitation or restriction or the hint of limitation or restriction on the power conferred, without regulation of the manner of the exercise of the power conferred save the leasing is to be "*under the same procedure as now provided by law.*" Under this system of laws the County Court is the successor to or inheritor of all probate authority exercised at common law by any court except where such power is limited by constitutional and statutory provisions. Where the legislature intended such power to be limited they have limited it, as for instance, by providing that the County Courts may not order or control the marriage of its wards. This jurisdiction *is in its nature exclusive because it is general in character* and the constitutional provisions do not confer on any other court *any jurisdiction* concerning probate matters except on appeal. It, therefore, of necessity, follows that the County Court is the only court in Oklahoma possessing *original probate jurisdiction*, and that as a consequence of the foregoing constitutional and statutory provisions it possesses all *the power theretofore possessed by chancery courts in the control, management and disposition of the property of its wards and possesses such jurisdiction to a greater extent than possessed by chancery courts.*

In *Duff* v. *Keaton*, 33 Okl. 92, 124 Pac. 291, the Supreme Court of Oklahoma, after reviewing the constitutional provisions, says:

"By sections 1, 2 and 3 of article 7 of the constitu-

tion, jurisdiction of all probate matters is conferred upon the County Court."

It was further held in that case that the sections of the statutes above quoted control the proceedings of County Courts in the sale of an oil and gas mining lease. The legislature has never changed or amended these statutes. It is insisted however that Rule 9 abrogates these provisions, and that the effect of the rule is to render void, for want of jurisdiction, any order or judgment of a court which is the result of proceedings not conducted in strict compliance with the rule. We submit that the rules cannot have that effect, and that the conclusion of the Supreme Court in the cases mentioned is absolutely untenable, for the following reasons:

First. All the authorities hold that a rule of court *cannot take away from, add to, or change the statute*, and therefore Rule 9 could not take away the constitutional and statutory power of the County Court to make the orders assailed in these cases.

Second. Section 5347, Revised Laws of Oklahoma, gives the Supreme Court the power to revise its general rules and make such amendments thereto as may be required to *carry into effect the provisions of the code*. One of the provisions of the code to which effect must be given, as construed in *Duff* v. *Keaton*, is that the probate court has the right to *order a private sale of a lease*. Any rule must therefore *give effect to such a provision*, but the decision of the court in the *Winona* and *Carlile* cases is that the rule *takes it away*. Section 5347 further provides that the court "shall make further rules consistent therewith as they may deem proper." A rule *taking away the very power given by the code, viz.*, the power to make a private sale,

is certainly *inconsistent* therewith and in violation of the statute.

Third. The defendant, The Prairie Oil & Gas Company, could not have anticipated such a construction of Rule 9 because statutes controlling probate procedure, just as mandatory in language and form as the provisions of that rule have been construed, in a long line of decisions by the state Supreme Court, before its rights accrued, as directory only and not affecting the jurisdiction of the County Court.

Conceding the entire correctness of the doctrine that rules of court lawfully promulgated and properly put into effect have the binding force and effect of law, yet if Rule 9 is to be considered in any other light than as being directory merely it must fail and be rejected as of no force and effect because:

(a) It deprives the County Court of the discretionary power conferred by section 6569 of the statutes; *(b)* because it interferes with the exclusive jurisdiction and control of the guardian in the management and disposition of the property of his ward conferred by section 3330 of the statutes; and *(c)* because it is an attempt to limit and control the jurisdiction conferred on County Courts in probate matters by the constitution, and expressly as to the jurisdiction conferred by sections 3330, 6569 and 6547 of the statutes.

It is at once evident that if without Rule 9 County Courts had jurisdiction to approve or direct the making of oil and gas mining leases by guardians on the lands of their wards, without advertisement and without public sale, and such rule is to be construed as to deprive such courts of

such power, *it is a limitation upon the jurisdiction of such courts*, and deprives such courts of the power to be governed and controlled alone by what, in their judgment, is the best interest of the estate of the minor.

This is so because the question is not presented on appeal or on direct attack, but insofar as the particular question under consideration is concerned, each of the cases under review constitutes a collateral attack on the judgments of the County Court, and the question now presented to the court is not whether the County Courts wisely exercised the discretion conferred by law on them; it is not a question of whether the record discloses that the action of the different County Courts was for the best interest of the minor, but the attack is frankly predicated on the assumption that the County Courts had no jurisdiction because of the alleged departure from Rule 9, and that therefore the orders made are void and subject to both direct and collateral attack.

If Rule 9 is to be given the force ascribed to it by the lessors, this court must of necessity hold such rule to be void and of no effect, whereas, if it is held to be directory or advisory, there is and can be no question of its validity, and when two constructions are capable of being placed on the rule, one of which gives it force and effect, and the other deprives it of force and effect, the construction which will give force and effect to the rule is that to be adopted and declared as the true construction.

In order to demonstrate the correctness of these statements it is only necessary to consider a few sections of the state statutes.

Section 1458 (Laws of 1921) provides:

"Guardians of infants and insane persons are

hereby empowered to lease and grant mineral oil and mineral gas, in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court as now provided by law, where such consideration is money."

It appears from the most casual examination of the terms of the above section that guardians are vested with power *(a)* to make a mineral oil and gas lease for a royalty instead of for cash; *(b)* to make a grant of mineral oil or gas in consideration of a royalty instead of for cash; *(c)* that such lease or grant must be approved by the County Court, and in such approval the same procedure must be followed as that provided by law where the consideration of such lease or grant is money; *(d)* that the act presupposes that the power exists in the guardian, with the approval of the County Court, to make oil and gas mining leases and grants for a cash consideration, and also presupposes that a procedure governing such a lease or grant for cash exists.

Assuming this analysis of the statute to be correct, and that it is so scarcely admits of a doubt, it is necessary to discover the statute under which the authority of the guardian to make oil and gas mining leases for cash, and providing the procedure therefor, is given. This statute is found in section 1482 of the Laws of 1921, which is as follows:

"The County Court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate or in any other manner most to the interest of all concerned therein; and the County Court may make such other orders and give such directions as are needful for the

management, investment and disposition of the estate and effects, as circumstances require."

To appreciate the full force and effect of this last section, it is necessary to consider the same together with section 6583 of the statutes, which is as follows:

> "In all cases the court making the appointment of a guardian *has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward.*" (Italics ours.)

These two sections taken together, and in connection with the other statutory and constitutional provisions quoted in this brief, conclusively establish that the County Court is the only court that is given jurisdiction to control the guardian in the disposition and management of the estate of his ward, and that such jurisdiction is exclusive. This means it is free from the dictation, supervision or control of any other superior directing force, and that *to undertake to control, and direct the County Courts, and to say to them that they shall proceed only in a certain manner and by a particular designated method, and to say that unless such power is exercised in the manner and method so prescribed the County Court has not jurisdiction, is to, in reality, control the guardian in the management and disposition of the ward's estate, for when we control the power behind the throne we, in fact, control the throne.* When we say that the acts of the guardian shall be of no binding force and effect unless such acts conform to and receive the sanction of a rule prescribed by any other body than the County Court, we, in truth and in fact, as well as in effect, *control the guardian in the management and disposition of his ward's estate.* When, in addition to the pro-

visions of law, a court lays down a rule, *and says there exists no right of action except in conformity to and in compliance with such rule, it limits, it controls the jurisdiction existing before the announciation of the rule.*

If the rule so announced deprives the court of *any discretion*, and compels action only in a *particular channel*, regardless of whether the court acting thinks such action is best for the interest of the minor or not, it deprives it of the *discretionary powers vested in it by the constitution and the statutes*, and deprives it of the power to control the guardian in the management and disposition of his ward's estate as to what the court considers to be the best interest of the ward, *and substitutes the discretion of the County Court by the discretion of another court.*

The reason that County Courts and the chancery courts in exercising probate jurisdiction have been invested with discretionary powers in the management and control of the estates of their wards is that human experience has demonstrated the folly of trying to provide for the unknown contingencies that arise in the management and control of such estates by inflexible rule. Such experience has demonstrated the need of *flexibility and the injurious effects of its want.*

It is apparent from the most casual inspection of the above sections of the statute that they prescribe the procedure to be followed in the leasing of minors' lands. The words "as now provided by law," in section 6547, mean something, and must mean that such section proclaims and ordains *the then existing procedure as the procedure necessary to be followed.* The procedure is that found in section 6563 of the statute, that is, that on application to the Coun-

ty Court to lease lands of his ward by a guardian, the County Court has power to make such orders and give such directions as are needful for the management and disposition of the estate and effects of its ward as circumstances may require, and to approve or disapprove the making of such leases as in its discretion the interests of the minor require, and there is nothing in either section of the statute that requires the *application to lease to precede the actual leasing*. There is nothing that indicates a legislative intention to secure the prior authorization of the court to the making of a lease before its execution by the guardian. The only thing necessary to obtain is the approval of the County Court to the lease or grant, and it matters not whether the approval is made prior or after the leasing. In fact, the more orderly method of procedure would be to secure the approval after the leasing. This being the procedure provided by law, no court can make a rule *changing or modifying such procedure unless by constitutional or statutory enactment it is expressly given the power to modify or change the rules established by legislative enactment*. This we believe to be too clear to need further argument or lucidation. In fact, it seems that the above propositions are so clear that argument but serves to conceal and not to explain, and therefore we will proceed to the citation of a few out of the multitude of cases sustaining the above propositions.

In *Duff v. Keaton, et al.*, 33 Okl. 93, 124 Pac. 291, the Supreme Court of Oklahoma, by Justice WILLIAMS, implicitly holds that section 1482 is the section under which the County Courts have power to approve oil and gas mining leases of guardians and furnishes the procedure named in section 6547. In such case the court says:

"But it is insisted that these conclusions are contrary to section 5530, Compiled Laws of 1910 (6547, Laws of 1910), which authorizes the guardians of infants and insane persons to lease and grant oil and gas mining rights in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the County Court, as now provided by law, where such consideration is money. But we have heretofore reached the conclusion that the rule existing at common law, by which the guardian was authorized to lease the lands of the ward for a number of years without the approval of the probate court, has been changed by section 5513, *supra* (6569, Laws, 1910), and that by said section said leases in order to be valid must be *first approved by the probate court;* it being specifically provided by said section that the probate court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require. Having also reached the conclusion that such a lease was personalty and not realty, *it is under the procedure by virtue of said section 5513 that oil and gas leases were authorized to be approved by the probate courts, and section 5530 obviously referred to such procedure by virtue of said section. This construction harmonizes all the provisions of said statutes.*" (Italics ours.)

In *Cabin Valley Mining Company* v. *Hall*, 53 Okl. 760, 155 Pac. 570, this court explicitly holds that section 1482 furnishes the procedure referred to in section 6547, the court saying:

"The procedure referred to is that prescribed by section 6569, *supra*, which requires the guardian to make application to the County Court, after notice in accordance with the directions of the judge, where-

upon the court is authorized to make such orders and give such directions as are needful and as the circumstances may require. *Duff, et al.*, v. *Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (n. s.) 472. There is no limit in this section as to the terms of the lease, nor any limitation as to the time for which same may run; it being left to the judgment of the court *in the exercise of a sound discretion, TO DETERMINE what is best for the interest of the minor under the circumstances.*" (Italics ours.)

So there is no limitation put upon the authority of the County Court to approve leases except that found in section 1482 of the statutes, and it is left to the sound *discretion of the court*, that is *of the County Court*, to determine whether such lease shall be made, after advertising for bids therefor at public outcry, *or by disposing of the same to a particular named person for a fixed price*. Either of these methods might at different times and under varying circumstances be for the best interest of the minor, and the court without limitation, is given authority by the statute to adopt either of these courses, or any other course, which, in its judgment, will be for the best interest of the minor under the then existing circumstances.

If Rule 9 limits the discretion so reposed in the court, it must, under all the authorities, be held bad, and the only way to uphold and sustain it is to regard it as only directory and advisory, and consequently jurisdiction of the court does not depend upon compliance with its provisions. In *De Lorme, Administrator*, v. *Pease*, 19 Ga. 220, the court, by Justice LUMPKIN, says:

> "It is not denied but that this rule of the Supreme Courts restricts the *discretion* of the courts as to the

permission to recall a witness, which was unlimited at common law. *Have the judges this power? Clearly not.* Their power extends to and was intended to embrace all ground *uncovered by the statute or common law.*" (Italics ours.)

In *Adams Express Company* v. *Trego*, 35 Md. 47, the court says:

"If the court below was not satisfied that the ends of justice required a continuance, it was clearly right in refusing to grant it; *and no mere rule of court could be allowed to operate to divest such discretion, or in any manner to change or modify the statutory provision on the subject. Rules of court must not be in conflict or inconsistent with the statute law of the state.*" (Italics ours.)

In *Gormerly* v. *McGlynn*, 84 N. Y. 284, it is said:

"The provision of the Code of Civil Procedure (Sec. 17) authorizing a convention of the general term justices and the chief judges of the Superior Court to establish rules of practice, does not empower said convention to *alter, modify or annul any rule of practice established by the code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code.*"

In *Gates, et al.*, v. *Mack*, 6 Col. 401, it is said:

"The next point made in behalf of the defendants in error is, that the appeal was properly dismissed for the default of the plaintiffs in error to comply with a standing rule of the District Court. This rule is set out in the transcript, and provides, substantially, that in any case appealed from the County Court to said District Court, if the appellant shall fail for a period of fifteen days to file in the District Court a transcript

of the proceedings, together with all necessary papers relating thereto, the appellee, upon filing a transcript of the judgment and a copy of the appeal bond, shall be entitled to have the appeal dismissed at the cost of the appellant. Counsel argues that it cannot be fairly inferred that the legislature ever intended to require written notice of a motion to dismiss in a case of this sort, where there is a standing and general rule of court, of which counsel are bound to take notice, providing for a dismissal; that such a rule is a standing notice of such motion, and that this rule is analogous to Rule 26 of this court, under which appeals are dismissed in like manner. *To these propositions we answer that a rule of court cannot supersede a statute.*"

In *Federal Cement Tire Company* v. *Korff*, 50 Ind. Appeals 608, 97 N. E. 185, the court says:

"The rule of court cannot abrogate or prevent the exercise of a statutory right."

In *Twaddle* v. *Winters*, 85 Pac. 289, the Supreme Court of Nevada says:

"Where there is a conflict between a statute and a Supreme Court rule, the former will control."

In *The People* v. *Nichols*, 79 N. Y. 583, the Supreme Court of New York, speaking of a rule which attempted to prevent judges from exercising certain jurisdiction except at stated times, and to designate terms of court at which only certain kinds of business could be transacted, said:

"It is provided by the constitution that the court itself shall have general jurisdiction in law and equity. It follows that this jurisdiction can be limited neither by the legislature nor by any power conferred by it upon the court itself. (*Hart* v. *Hatch*, 3 Hun. 375.) Its

functions are to be exercised by its judges sitting in general terms, or at the circuit or oyer and terminer or special terms. The constitution also provides that each judge may hold special terms in any county (Art. 6, Sec. 7), and neither in that instrument nor in any statute do we find that one special term, or one judge at special term has, or can have, more authority or power than another. The Code (Sec. 233) authorizes the justices of the Supreme Court for each judicial district to appoint the times and places for holding the special terms. This authority was exercised in the first district. Some of the terms thus appointed are designated by the justices as 'Special Terms for Equity Cases and Enumerated Motions,' and others as 'Special Terms for Non-enumerated Motions and Chamber Business,' and, while it cannot be doubted that for the due and orderly conduct of litigation and causes, certain steps and proceedings therein may, under the direction of the judges, be required to be taken at specified terms, yet any such regulation must be subject to the control of the justice who is assigned to hold them. *If otherwise the power of the judge would be limited, public interests sometimes put in jeopardy and the rights of citizens infringed.* The case before us illustrates this position." (Italics ours.)

Again on page 592 the court says:

"It is claimed that this rule has the force of a statute, and that the notice of the argument must, therefore be of eight days. *But the rule is binding only as it is consistent with the Code.*" (Italics ours.)

In *Meyer v. Tupper*, 66 U. S. 582, 17 L. ed. 180, the court says:

"After the passage of the Judiciary Act of 1789, Congress, at the same session, passed the act prescrib-

ing the process to be used in the different courts it had just established (1 Stat. 93); and by the act directed that, in the courts of admiralty and maritime jurisdiction, *the forms and modes of proceeding should be according to the course of civil law.*

"This act left no discretionary power in the admiralty courts, or in the Supreme Court, *in relation to the modes and form of proceeding.*" (Italics ours.)

In *Ward* v. *Chamberlain*, 67 U. S. 430, 17 L. ed. 319, the court explaining the holding in *Beers* v. *Houghton*, 9 Pet. 360, says:

"Explained as above, the remarks are perhaps without objection, *but it cannot for a moment be admitted that any rule adopted by this court, merely as such, can enlarge, diminish or vary the operation and effect* of mesne or final process upon the property of the debtor in respect to the matter under consideration." (Italics ours.)

In *Main* v. *Lynch*, 54 Md. 658, 668, the court says:

"This motion was opposed by the defendants because of the twenty-eighth rule of that court which is as follows: 'When a plaintiff or defendant has closed his case on the testimony, and a prayer shall be offered to the court upon such testimony, he shall not offer any additional evidence on the subject to which the prayer refers or with regard to the case in any particular'; but the court permitted the amendment and received the proof offered. It is the ruling of the court on this motion which forms the ground of the first exception. 'This court has always regarded a *legitimate* rule of the court as prescribing a law to the court.' *Dunbar* v. *Conway*, 11 G. & J. 97; and in *Wall* v. *Wall*, 2 H. & G. 82, and *Gist* v. *Drakley*, 2 Gill. 346, this court has said there exists no discretion in an inferior court

to dispense with its own rules, or innovate on the established practice. The rules of court which are, by the decisions referred to, given the force of law, until wholly rescinded, are such rules as a court has the power to pass; *for a court cannot pass a rule which takes away from a party litigant a right positively secured by law.*" (Italics ours.)

In *Saylor* v. *Taylor*, 77 Fed. 476, the Circuit Court of Appeals of the Fourth Circuit had before it for consideration the effect of the following rule:

"Among admiralty claims of otherwise equal dignity, the one first libeling shall be first paid, but petitioners shall be paid pro rata."

Under this rule, one of the parties in the trial court had been decreed precedence over other plaintiffs. In passing upon the effect of this rule, the court says:

"Upon reason, upon principle, and upon authority, all of the same class and of equal merit should share equally; and the only question remaining is whether these rights can be displaced by Rule 4 of the District Court, above cited. We are of the opinion that this rule cannot have that effect. The right to make rules is given in section 918 of the Revised Statutes in the words following (citing statute).

"By virtue of this section the courts may make rules of practice, *but they cannot create rules of law.* They cannot divest or displace rights or liens which owe their existence, not to its process, but to the general maritime law. Rights acquired under the Statutes of the United States, or under the general maritime law, which these courts are created to administer, *are rules of property, and it is beyond the potency of judicial power to alter them, or take them away by rules of practice.*" (Italics ours.)

In *Hamilton, et ux.*, v. *Fowler, et al.*, 83 Fed. 321, the court says:

> "These rules of practice and procedure, if regulated by the statute, are imperative, and control the power of the court, for statutory rules of procedure and practice cannot be changed by precedent of decision or by rule of court, but the statute must govern in all cases. As here, when the statute says that the parties shall have until the first day of the next term of the court to file their record, it means that they shall have that time, and, when the statute says that 'the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court,' it means that it shall not thus proceed before that time, and anything that has not already been done in the case cannot be done until that time, in the normal and orderly course of procedure. * * *."

In *Patterson* v. *Winn, et al.*, 5 Pet. 233, 8 L. ed. 108, the court was considering a rule which prescribed the method of proving lost instruments and providing that secondary proof of their contents could only be received in accordance with the rule. Proof of the instrument did not accord with the rule but did fulfill the requirements of the common law. In passing on the question, the court said:

> "We think that according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the loss or destruction of the originals to let in the secondary proof; *and that it was not competent for the court to exclude it by its own rule.* However convenient the rule might be to regulate the general practice of the courts, we think that it could not control the rights of the parties in matters of evidence admissible by the general principles of law. The judgment must therefore be reversed and the

cause remanded to the Circuit Court with directions to award a *venire facias de novo.*" (Italics ours.)

In *St. Louis & San Francisco Railway Company* v. *McAllister*, 165 Pac. 1123, this court says:

> "Of course, courts have the inherent power, independent of any statutory provisions, to promulgate rules for the regulation of their practice and business; but they can make *no enforceable rule that contravenes a statute or the law of the land.*" (Italics ours.)

Goodwin v. *Bickford*, 93 Pac. 548, involved the validity of a rule of Oklahoma Territorial Court requiring that the plaintiff in error in an appeal from the probate court make a deposit of $5.00 to apply on the costs of the clerk of the District Court. In holding the rule repugnant to the statutes then in force, the court says:

> "We shall consider the second reason assigned first; for, if it is well founded, it will not be necessary to consider the first reason assigned. It is a well-settled principle of law that courts, independent of any statutory provision, have the inherent power to make rules for the regulation of their practice and business, but they can make no rule that contravenes a statute or the law of the land. *Prindeville* v. *People of the State of Illinois*, 42 Ill. 217; *August Fisher* v. *National Bank of Commerce*, 73 Ill. 34; *Thomas Purcell* v. *Hannibal & St. Joseph Railroad Company*, 50 Mo. 504; *United States* v. *James G. Swan, et al.*, (D. C.) 77 Fed. 473. It cannot be said that, in imposing costs and prescribing rules governing their collection, in the practice of a court, that a different rule from the one announced above applies, or that a court has control over the same superior to the legislative department of the government, and that a court may make a rule governing the

same in conflict with the statute, because courts had no power at common law to impose costs, and such power exists only when authorized by statute, and a court in prescribing rules relative to the costs authorized by statute to be imposed by it cannot, in doing so, contravene a statute. *Maggie E. Bradford* v. *Southern Railway Company*, 195 U. S. 243, 25 Sup. Ct. 56, 49 L. ed. 178.

* * * * * * *

"* * * We could hardly conceive of a statute that could prescribe more specifically the detailed requirements necessary to perfect an appeal, and how the same shall be disposed of; but it does not require that any deposit for costs shall be made in order to perfect the appeal. On the contrary, it is specifically provided that after the appeal has been transmitted by the probate judge to the district clerk, to be filed in his office, without even a summons or notice to defendant in error, the case may be heard at any day of any general or special term of the court, and that if, when the case is called appellant does not appear, the same may be dismissed on motion of the appellee. There is nothing in this statute that will permit the construction that anything else than what is mentioned therein is required to be done, or may be required to be done, by the court before the appeal is perfected; and under the language of the statute, when the appeal has been perfected, it may be heard at any general or special term of the court. Any rule of the court requiring additional things to be done by the appellant than those prescribed by the statute herein quoted would contravene the statute, and would be invalid."

The statute governing defaults in Ohio provided that "in an action upon an account or written instrument for the payment of money only or in foreclosure, judgment may

be entered at any time during the term after the defendant is in default for an answer; but the court may for good cause shown give further time for answer."

Rule 16 of the Superior Court (that being the trial court) provided that if a party neglected to file proper pleadings within the time fixed by statute or expiration of leave granted to amend, he should be held to be in default, and that the clerk should note the fact of default and notice thereof should be given in the Index for three successive days after which the cause might proceed to judgment.

Judgment was rendered on default without compliance with Rule 16 and before the expiration of the three days fixed by that rule. After the term the court vacated the judgment and this was held to be error. We quote the following from the opinion in *Van Ingen* v. *Berger*, 82 Ohio St. 255:

> "It would seem not to require argument to show that the statute and the rights of parties under it cannot be abridged by a rule of court, and if a rule is framed so as to defeat or materially restrict the clear purpose of the statute, such rule cannot be held valid. It is insisted by counsel for defendant in error that the word 'may' in the above section, and the last clause respecting the giving of time to answer, indicate that the rendition of judgment or its refusal is discretionary, and that the rule requiring three days' notice of default in the Court Index is not an abuse of discretion. This proposition, so far as it relates to discretionary power, or at least to the extent that the action of the court involves the exercise of some discretion, may be conceded, for it is held in *Dallas* v. *Fernean*, 25 Ohio St. 635, that where judgment is rendered on default, in an ac-

tion on an account, without proof of the plaintiff's claim, there is no error for which the judgment will be reversed, the requiring such proof, on failure to answer, being a matter within the discretion of the court. But this does not seem to advance the argument of counsel in this case. If the court possessed discretion to allow or refuse judgment on default, and might have required proof of notice in the Court Index before allowing it, it then exercised its discretion in favor of the plaintiff; it rendered the judgment. If the court had required compliance with Rule 16 before rendering the judgment, and the plaintiffs were complaining of that, we would then have the question which counsel argue. The findings of the trial court and entry of judgment are explicit. They apparently show the right of the plaintiff to a judgment by default precisely as it was rendered. If it was the absolute duty of the court, irrespective of any rule of court, upon plaintiff's demand for a judgment to render such judgment, then of course the rule could have no effect upon the situation, while if the court had discretion to refuse plaintiff's demand, or comply with it, it could not be deprived of that discretion by a rule of court unless the rule is in law superior to the statute. We think it is not. To hold that it is superior would be to hold that a court is superior to the law, and by a rule can make a special rule of law for the City of Cincinnati, upon a subject of a general nature, different from the law prevailing in other sections of the state, a power which has been denied to the general assembly itself.

"The rule is attacked as being invalid. We are not called upon to discuss this question, as it is not presented by the record. Whether or not, as a guide to the exercise of proper discretion in entering judgments by default, the rule is or not a reasonable one, may be properly left for decision until a case arises presenting the question."

The Circuit Court of the United States, in Alabama, by a general rule adopted the practice of the state courts which is regulated by a statute providing that no bill of exceptions can be signed after the adjournment of the court unless with the consent of counsel. In this case bill of exceptions was signed by the judge of the Federal Court after the adjournment of court and without consent. In holding that this was sufficient although not complying with the rule, the court in *United States* v. *Breitling*, 20 How. 252, said:

> "But the answer to this objection is, that the statute of Alabama, and the regulation it prescribes to the courts of the state, can have no influence on the practice of a court of the United States, unless adopted by a rule of the court. And it is always in the power of the court to suspend its own rules or to except a particular case from its operation, whenever the purposes of justice require it."

The Circuit Court of Christian County, Missouri, had a rule which required the defendant in a criminal case who desired witnesses in excess of a certain number to make application supported by affidavit setting forth the names of the witnesses and the facts which witnesses were expected to testify to. After quoting the bill of rights of the Constitution of Missouri and the statutes relating to process for witnesses in original cases, the court, in *State* v. *Gideon*, 119 Mo. 94, says:

> "The statutes are sufficient, if carefully and faithfully executed, to exclude the fees of all unnecessary witnesses; more severe than this, they ought not to be.
>
> "It is sufficient to add that this rule imposes harder terms than the statute does, and for that reason it cannot be enforced. The conclusion we have reached accords not only with our own decisions, but with those

of other courts of last resort in the several states: *Hickernel* v. *First National Bank*, 62 Pa. St. 146; *Oates* v. *Mack*, 6 Cal. 401; *State* v. *Posey*, 17 La. Ann. 252, 87 Am. Dec. 525; *Patterson* v. *Winn*, 5 Pet. 242."

There is an extended note to this case in 41 Am. St. Reports and the limitation upon the power to prescribe rules is discussed fully, beginning at page 641.

State v. *Posey*, 17 La. Ann. 352, 87 Am. Dec. 525, was a proceedings for mandamus and the plaintiff alleged that she had instituted suit for a money judgment and that the case, being ripe for default, she asked for a judgment and that judgment was refused. The judge responded that he had adopted a rule for the term and under similar circumstances would renew it at another term "that no cases should be tried except the criminal cases and matters of succession" and that he was induced to make this rule by reason of the distress of the people immediately following the civil war. The court, in granting mandamus, announced the rule as follows:

> "In this case the judge has, without even a request from either party, arbitrarily forced a continuance. He has yielded to solicitations of persons, not parties, and deprived relatrix of the legal right of trial of her cause.
>
> "The judiciary is not by the constitution invested with legislative powers. It has no authority to deprive the citizen, by its rules, of his legal rights.
>
> "The judge must conform to the law, though he should think that thereby certain citizens would be injured, or that its provisions do not exactly come up to a proper administration of justice. If the citizens desire relief by the alteration of the law, for the administration of justice, they must apply to the law making power and not to the judiciary."

In *Suckley's Administrator* v. *Rotchford*, 13 Grattan 60, 65 Am. Dec. 240, it was said:

> "In my opinion the appellant's intestate was rightly in court praying the relief sought. His proceedings for maturing his case seem to have been had under the laws of Virginia in force February 27, 1801. I perceive no error therein, taking, as I do, the recitals in the decree as sufficiently showing that the case had been regularly proceeded in. If it should be conceded that a rule of the court did require the bill to be filed before the subpoena issued, still, as the law directed otherwise, the law must prevail. Although the Supreme Court had authority to prescribe rules of practice in the Circuit Court, those rules must be subordinate to the law. Although Congress might have repealed or altered the law, yet it could not delegate that authority to another body."

The Superior Court of Cook County, Illinois, adopted a rule whereby an action *ex contractu* may be brought to trial out of its order upon the docket, upon the affidavit of the plaintiff of a belief that the defense is made for delay, unless it is made to appear by affidavit of facts in detail that the defense is made in good faith. The Supreme Court of the state, in *Fisher* v. *National Bank of Commerce*, 73 Ill. 34, held such a rule to be void and said:

> "And the defendant, in such case, to entitle himself to a trial *under the statute*, is only required to file an affidavit with his pleas, stating that he verily believes he has a good defense upon the merits, while *under the rule of the Supreme Court* he is compelled to make it appear to the court by affidavit of facts in detail, that the defense is in good faith. The practice, being regulated by law, must, under the Constitution, be uniform; and from whatever source the Superior Court

may have assumed to derive its authority to adopt the rule, inasmuch as it is *inconsistent with the general law*, it is void and of no effect." (Italics ours.)

If we are correct in our conclusion that Rule 9 is a rule of procedure only, and admitting that it is binding upon the County Courts and litigants in the sense that the latter have a right to invoke it, yet, if the rule is not invoked at the time, and during the course, of a proceeding which results in judgment, can such judgment be afterwards collaterally assailed in an independent proceeding because the court and the parties to the transaction failed to observe the rule? The question, we think, should answer itself.

In a long line of decisions the Supreme Court of Oklahoma has construed certain statutes relative to the proceedings of probate courts in respect to infants and their property as directory only, a failure to observe which, while irregular and erroneous, is not fatal to the jurisdiction. Some of these cases decided prior to the time the rights in question here arose, are:

Spade v. *Morton*, 38 Okl. 384;
Eaves v. *Mullen*, 107 Pac. 433;
Hathaway v. *Hoffman*, 153 Pac. 184;
Baker v. *Cureton*, 150 Pac. 1090;
Socken v. *Winstock*, 144 Pac. 372;
Parmenter v. *Ray*, 158 Pac. 1183;
Cowen v. *Hubbard*, 151 Pac. 678;
Coules v. *Lee*, 128 Pac. 688;
Cabin Valley Mining Co. v. *Hall*, 155 Pac. 570.

These cases held that various statutory provisions, although just as mandatory in form and language as Rule 9,

are directory merely and did not affect the jurisdiction of the court.

In *Spade* v. *Morton* and *Eaves* v. *Mullen*, it was held that the faliure to conform to the statute requiring notice by advertising of all sales of an infant's real estate was not a jurisdictional defect. *Baker* v. *Cureton* and *Hathaway* v. *Hoffman* held that the failure to give notice of the appointment of a guardian, although the language of the statute in that respect is mandatory in its form at least, was jurisdictional.

In *Parmenter* v. *Ray* the provision of section 5285 of the Revised Laws of 1910 requiring that the probate court in the appointment of a special administrator *must* give preference to the person entitled to letters testamentary or of administration was held not to be mandatory but that in making such appointment the court may exercise jurisdiction, and the court refused to follow the case of *In re Misc*, (Montana) 38 Pac. 228, holding the contrary.

Cowen v. *Hubbard* held that a defective petition for the sale of lands gave the court jurisdiction and that a sale thereunder was not subject to collateral attack.

In *Welch* v. *Fackt*, 171 Pac. 130, the Supreme Court, speaking through Justice RAINEY, summing up the doctrine announced in these cases, says:

> "Before we proceed further it might be well here to call attention to the fact that there is quite a conflict in the authorities on the question as to what constitutes jurisdictional defects in the proceedings for the sale of the ward's real estate. As was observed in *Eaves* v. *Mullen*, *supra*, practically all the courts agree that there are many defects in the sale proceedings of a

ward's real estate which will not render the proceedings void. Some courts hold that practically all of the statutory steps are jurisdictional but we have adopted the other rule, and there are many compelling reasons unnecessary to be stated at this time, why we should not at this late day depart therefrom."

Probate courts for many years have acted in accordance with the doctrine established in this jurisdiction by the foregoing decisions. They have announced a principle that irregularities, errors, failure to observe some statutory provision, although mandatory in its language and form, do not affect the jurisdiction of the County Court so as to make its judgments and orders subject to collateral attack. In this state of the decisions it could hardly be anticipated by the parties to the transaction in question that the court would completely reverse itself and adopt that strict construction of the controlling statutes which by a course of decisions extending over many years they had refused to do. The Prairie Oil & Gas Company was justified in assuming that Rule 9, although having the force and effect of a state statute, would be deemed directory only and as a mere rule of procedure not affecting the jurisdiction of the County Court. Certainly it could never have anticipated that the Supreme Court would do what no other court has ever done, that is to say, promulgate a rule in pursuance of a statute giving it authority to make rules to carry into effect the statutes of the state, and then construe the rule as superior to such statute.

The statement in the *Winona* case that the probate rules grew out of, and were made necessary by the opinion in *Huff v. Keaton, supra*, is incorrect. These same rules were in force in most of the probate courts on the east side of

the state prior to their promulgation by the justices of the Supreme Court of Oklahoma. Their main purpose was to secure uniformity in the rules governing transactions relative to Indian lands and to fix certain specified dates upon which such matters would be heard so that the United States probate attorneys, who in many cases had to attend more than one court, might have an opportunity to be present and in order that the dates of hearing in the various counties over which he had jurisdiction might not conflict. One or two of the county judges would not agree to this plan, and it was for that reason the justices of the Supreme Court were appealed to for the purpose of making it obligatory on all the probate courts to adopt the same rules. It may be true that a public sale of leases, after notice, was the policy, both of the state courts and of the originators of the rules but in *distinct recognition of the power of the court to order a private sale under the statute* it was expressly provided in Rule 18 that *notice might be waived* unless it was a notice required by law, that is, by a statute of the state.

The case of *Winters v. Oklahoma Portland Cement Company*, 164 Pac. 985, cited in the *Winona* case in support of the court's conclusion has no application to the question. That case involved a substantive law—an act of the legislature taking away from the County Court its necessarily admitted *former discretion and power* to confirm a sale of a minor's land at private sale for less than ninety per cent of its appraised value. The act of the legislature was not for the purpose of regulating the procedure of such a sale, for in express and mandatory terms it prohibited it. Suppose such act had not been in existence; would the court then have had power by a *mere rule* to prohibit such a sale? And could the Supreme Court now by *rule* provide that a sale

for less than *ninety-five* per cent of the appraised value should be valid notwithstanding the statute permitting its confirmation for *ninety* per cent? If the answer is that it could not do so because such a rule would be inconsistent with the statute, then of course the whole argument falls to the ground for Rule 9, if construed to *prohibit* a private sale, is inconsistent with the conceded, acknowledged and decided power of the court, prior to Rule 9, to direct a private sale.

Cabin Valley Mining Company v. *Hall*, *supra*, decided February 16, 1916, involved the making of a private contract between the only persons interested, the lessor and lessee, extending the term of an existing lease. The question in the case was as to whether a County Court had jurisdiction to authorize the extension of a lease theretofore made by a guardian to the lessee in that lease. The County Court in that case had authorized the guardian to make and execute a contract with the lessee of an existing lease, extending the term. It was held that the power and jurisdiction of the County Court, not being inherent, were to be determined by the constitution and laws of the state, and the conclusion was reached that, under the Constitution and Statutes of Oklahoma, the court had such power and that the grant of power embraced authority in these courts to afford such relief as was formerly administered by courts of equity in like matters. This court in *Tibbets* v. *Clayton*, 288 Fed. 393, called attention to the *Cabin Valley Mining Company* case, and other decisions of the State Supreme Court, establishing and recognizing the practice in County Courts in respect to extending the terms of existing leases without a public sale, and recognizing the jurisdiction of such courts in the premises.

The decision in the *Cabin Valley Mining Company* v. *Hall* case, which cited other decisions of the same court in support of its conclusions, was only four months old when the County Court directed the extension of the leases in question, and approved the terms of the agreement which had been reached between the guardian and the lessee, Los Angles Cherokee Oil Company. That decision had not been reversed or modified when The Prairie Oil & Gas Company purchased the leases so extended in April, 1917. True, Rule 9 was then in force, but could it be contemplated that the Supreme Court of the state would apply, or that it would have the power to apply, that rule so as to give it the effect of a mandatory statute of the state depriving the County Courts of their jurisdiction to do every thing which it was held in the *Cabin Valley Mining Company* case and other cases they had the power to do under the constitution and laws of the State? Could it be then supposed that the justices of the Supreme Court could, under their right to make rules of procedure, usurp the functions of the legislature, for that is really what *Winona* v. *Barnes* decided. We agree that the Supreme Court may prescribe rules of procedure for inferior courts and that it may enforce obedience to the rules, not only by parties to legal proceedings in these courts but by the courts themselves. But we cannot concede without doing violence to the principles upon which our form of government rests, the power of the Supreme Court, or its members, to declare that such rules cannot be waived by the parties interested, and that their strict observance is essential to the jurisdiction of the County Courts, a jurisdiction which they exercised, with the full approval of the Supreme Court, and by virtue of the constitution and statutes of the state, long before the rule was enacted, and which jurisdiction indeed the rule itself impliedly recognizes.

If then The Prairie Oil & Gas Company purchased these extended leases at a time when the state Supreme Court by its decisions, had recognized the authority of the County Court to grant the extension by its approval of a contract between the parties interested to that effect, and could not have anticipated that the existing rules were anything more than regulatory of the procedure, which might be waived, and could not affect a completed transaction in which all parties interested had acquiesced, and to which they had given their free consent, so far as the record discloses, then it acquired a vested property right of which it cannot be divested merely because the Supreme Court, subsequent to that time, has given to a rule of procedure the effect of substantive law, and has construed it to be mandatory and its observance a condition to the jurisdiction of the County Court. As said in *Haskett* v. *Maxey, supra:*

> "Courts of last resort are often constrained to change their rulings on questions of the highest importance. When this is done, the general rule is that the law is not changed, but that the court was mistaken in its former decision, and that the law is, and always has been, as expounded in the last decision. But to this general rule there is a well established and well-understood exception. This exception is that: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment'."

The argument based upon *Ex parte Virginia*, 100 U. S. 313, that because the Supreme Court of Oklahoma decided

in *Freeling* v. *Kight*, 152 Pac. 362, that it had power to mandamus a probate court to recognize these rules, the decision necessarily amounted to a holding that the rules go to the jurisdiction of the probate court, is a *non sequitur*. The right to a superintending control of inferior courts is older than American civilization. It is that exercised for many centuries by the Court of King's Bench over the inferior tribunals of England. (2 Blanckstone, p. 111.) Such superintending control was for the purpose of keeping inferior courts within the bounds of their jurisdiction; certainly not to impair that jurisdiction. The provision of the Oklahoma Constitution quoted by petitioners that "the original jurisdiction of the Supreme Court shall extend to a general superintending control of all inferior courts and all commissions and boards created by law," was not the source of the power of the justices of the Supreme Court of Oklahoma to make rules for inferior courts. That power is granted to them by section 5347, Revised Laws of 1910, and in the preamble to the adoption of the rules they expressly state that the rules were made pursuant to that section. If it were true that the constitutional provision referred to was the source of power to make the rules in question, as intimated in the *Wisosa* case, then the legislature could not take away such constitutional power from them and could not legislate on that subject, as it attempted to do by the Act of April 4, 1919, Session Laws of Oklahoma, 1919, page 288. That position is contradicted by the action of the justices of the Supreme Court when, on June 11, 1917, they recognized the right of the legislature to legislate on the subject, by revising the rules so as to omit Rule 10, because "the matters regulated therein have been provided for by statute." (171 Pac. IX.)

The case of *Freeling* v. *Kight*, *supra*, is cited by petitioners as holding that a County Court is without authority to dispense with the probate rules. Of course the power of the Supreme Court to make a rule of procedure a matter of jurisdiction so as to take away the constitutional or statutory authority of inferior courts, is not determined merely by the claim that it has that power, so far as this court is concerned. But let us see what was involved in *Freeling* v. *Kight*. The County Court of Rogers County had, on June 5, 1914, adopted these same probate rules, which had in fact been suggested to all the probate courts by the Department of the Interior. After the promulgation of the rules by the justices of the Oklahoma Supreme Court, they were re-adopted by the Rogers County Court on July 15, 1914, and continued in force until July 4, 1915, when the county judge made an order vacating and setting them aside, and adopted other rules in conflict therewith. The state, on relation of Freeling, its Attorney General, applied for a writ of mandamus to compel the county judge to observe the rules. But there was not involved in that case the validity of any judgment or order of the court with respect to any matter pending before it, or any transaction completed with the consent or acquiescence of all parties in interest without a compliance with the rules. No construction or interpretation of the rules, or their effect, upon acts done by the court under them, was involved. The sole question presented was the right of the justices of the Supreme Court, under the statute referred to, to make and enforce obedience to its rules, prescribed "for the proper and expeditious conduct of the business of said court and other courts of record of said state." That right, even without an authorizing statute, may be conceded. That was the only thing which the

court was called upon to decide in the *Kight* case. It was the only thing which it did or could decide. The question here was in no way involved. The only observation of the court in that case which at all pertains to the question here was that a rule of court has the force and effect of law. We admit that, of course, in the sense that it must be obeyed by the parties interested in the subject-matter to which it applies. Either that court, or counsel here, has confused law in the substantive sense with law in the sense of regulation and procedure. The legislature has the power, for instance, to make a certain act criminal which otherwise would not be so, and to fix the punishment. But could a court, by a rule, make such a "law?" The court may by rule *regulate the manner of conducting a private sale* which is admittedly authorized by the Oklahoma Code—and which the state court has often recognized—and such a rule, of course, has probably the same force and effect as a statute of the legislature enacted *for the same purpose*. But the court could not by rule *prohibit* a private sale. Its power is to *regulate* the procedure in the doing of a lawful act, not to *prohibit* the doing of the act itself.

The statute, under which the Supreme Court justices acted in making the rules, makes it their duty to meet every two years during the month of June at the capital of the state "and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this code."

—Section 890, Revised Laws, 1921

Now, one of the provisions of the code to which effect must be given is that the probate court has the right to order the private sale of a lease. That is necessarily so, both

under the statute and the prior decisions of the court. Any rule made by the justices must therefore give effect to such provisions; but the decision of the court in the *Winona* case is that the rule takes it away. The section quoted further provides that the justices of the Supreme Court "shall make rules consistent therewith as they may deem proper"; that is, consistent with the code. A rule taking away the very power given by the code, namely, the power to make a private sale, is certainly inconsistent therewith and in violation of the statute.

—*Beers* v. *Haughton*, 9 Pet. 329.

IV.

The second proposition urged by petitioners is that the extensions should have been set aside because of fraud in obtaining them.

The fraud charged in these cases was that the extensions of the leases were void for the reason that they were

> "procured by the fraud, duress and false dealing of the Los Angeles Cherokee Oil Company so exerted that the said agreement was procured for a grossly inadequate consideration, the actual value of the said agreement at the date thereof being not less than $175,000.00, while the consideration actually paid was only $18,000.00, the lands herein described as the allotment of the said William G. Twist, deceased, and covered by this action, being included in said extension agreement. That said false and fraudulent dealing and duress consisted of the following acts and representations, to-wit: That the officer of the said Los Angeles Cherokee Oil Company having full and complete control of the operations of the company, and all its business was one

J. F. Pitt, and another of the said officers was one H. P. Anderson; and that said officers and agents of the said company, expecting to secure the said agreement and with the view of obtaining influence and the friendship and confidence of the said Leoria L. Twist Weldy, the said guardian, proposed, agreed to and did execuite her bond as guardian, and are now the bondsmen upon the guardian's bond of the said guardian. That prior to the date of the said agreement, they, and particularly the said Pitt, advised the said guardian that it was beneficial and to the best interest of the said wards that such an extension agreement should be executed, and that a consideration of $18,000.00 was adequate and sufficient therefor, which said statements and representations were false and known to the said Pitt to be false, but which said representations were relied upon by the said guardian, who placed implicit confidence in the judgment of the said bondsmen, knowing them to be practical and experienced oil men. That to further the said scheme to secure the said agreement, the said officers and agents approached the attorney for the said guardian, E. Robitaille, and endeavored to secure his co-operation, and also sought the influence of the ward, Albert T. Twist, and failing to secure their aid in their efforts they resorted to threats, and advised the guardian that they would be compelled to complain to the court of her failure to do what they represented to be for the best interests of the wards, and suggested to the said son of the guardian, Albert T. Twist, that his mother could be removed as guardian if she failed to carry out their desires; and the guardian, believing that this course was capable of being pursued by them, and fearing that the affairs of her children might be placed in the hands of strangers, consented to the proposed agreement, and signed the papers prepared for her by the said officer of the said company. That to further lull the suspicions of the

guardian, and to present the appearance of fair dealing, the said Los Angeles-Cherokee Oil Company, through its said agents, officers and attorneys, prepared what purported to be a notice of sale, so that it appears that notice of public sale was given, but plaintiffs aver that said notice is in fact a notice to show cause why a sale should not be had, and that no order of sale was in fact ever made and entered by the court, and no public sale had, but that the agreement was made pursuant to an understanding had prior thereto, and without opportunity to others than the said Los Angeles-Cherokee Oil Company to bid thereon." (R. 5, 6 and 7.)

The testimony of Leoria L. Twist Weldy, so far as it relates to the charge of fraud, is as follows:

Q. The Los Angeles-Cherokee Oil Company operated this property and produced oil from it?

A. Yes, sir.

Q. And each of the tracts, did they?

A. Yes, sir.

Q. After the period of operation was any inquiry made of you with regard to changing the form of the leases?

A. There was.

Q. When and by whom?

A. Well, at different times, by Mr. Pitt, also Mr. Anderson at one time.

Q. Mr. Pitt and Mr. Anderson to whom you refer were gentlemen associated with the Los Angeles-Cherokee Oil Company?

A. They were; they belonged to the company, stockholders.

Q. Do you remember how long before certain court proceedings were instituted they first begun to talk with you about the extension of these leases or the changed form of the leases?

Mr. Davidson: We object to that as incompetent, irrelevant and immaterial to any issue.

The Court: I will let it go in the record.

Mr. Davidson: Exception.

A. Well, it was in 1909, the first time they ever named it to me.

The Court: Who named it to you?

A. Mr. Pitt and Mr. Anderson were both together.

The Court: Who is Mr. Pitt?

A. He was a stockholder and foreman or something for the Prairie people.

Q. He had charge?

A. Yes, sir.

Mr. Davidson: It surely couldn't be material back as far as 1909.

The Court: No.

Q. Just prior to the institution of the court proceedings did Mr. Pitt or Mr. Anderson on behalf of the Los Angeles-Cherokee Oil Company talk to you in regard to the changing of the form of the leases?

A. Yes, sir, Mr. Pitt did several different times for the last year or two before we did change.

The Court: Mr. Linebaugh, she signed a petition here which sets out these facts. I don't see the relevancy of any conversation she had with them.

Mr. Linebaugh: Well, to show why she filed the petition.

Q. You filed a petition with the County Court of Tulsa County asking that the form of these leases be changed or the terms be changed?

A. Yes, sir.

Q. Who prepared that petition?

A. Well, I think that Mr. Rice & Lyons. I am not sure.

The Los Angeles-Cherokee had them prepared themselves.

Q. Where were you when you signed the petition, if you remember?

A. I think I was at home.

Q. Who brought the petition to your home?

A. Mr. Pitt.

Q. Why did you sign the petition?

Mr. Davidson: We object to that.

The Court: I will see what her answer is.

A. Well, there was various reasons.

Q. Tell the court what those were.

A. Well, kind of fear, to be positive.

The Court: Fear?

Q. Fear of what?

A. Well, I had been getting letters from different oil companies around me——

The Court: Oh, well; I will exclude that.

Mr. Linebaugh: I think probably this will be of some importance, your honor.

The Court: Why?

Mr. Linebaugh: The fact that she had received letters saying that they were going to put vacuums on wells adjacent to her property. Mr. Pitt says if vacuums are put on we will have to put vacuums on and that will draw all the oil out very quickly and you had better take this $18,000.00. But we will show immediately after she filed this petition those letters stopped coming and no vacuum was put on.

The Court: I will let it go in and hold against you on it.

Mr. Linebaugh: That is merely one of the circumstances.

The Court: If that is all you have got.

Mr. Linebaugh: No, that isn't all, your honor.

The Court: That is a reflection on her as guardian. Who was your attorney, madam?

A. I didn't have any to represent me at that time, they done all the work themselves. I was in very poor health. I had had one but I didn't have any right at that time because they said it wasn't necessary, they would fix the papers all themselves.

Mr. Davidson: Did Mr. L. J. Martin represent you?

A. No, not at that time.

Mr. Linebaugh: We offer to prove——

The Court: Don't offer to prove, but put it in there.

Q. You may go ahead with the statements, if any, that were made——

The Court: Statements made by Mr. Pitt. The letters are the best evidence of what they contained.

Q. What statements, Mrs. Weldy, if any, did Mr. Pitt or Mr. Anderson make to you at the time they were discussing with you the question of changing the form of the leases with regard to the installation of vacuums on the wells?

Mr. Davidson: We object to what Mr. Pitt says. Her evidence is, Mr. Pitt was foreman.

The Court: She testifies Mr. Pitt came to her to get her to sign the extension. If he made any negotiations that would be evidence that he was acting for his company.

Mr. Linebaugh: You may answer.

A. Well, he said that if the other companies put those vacuums in they would soon kill the life of the wells, and also when he was wanting me——

The Court: Now, let me ask you a question. If you didn't extend the leases you would get the wells back, wouldn't you?

A. Certainly.

The Court: Then you could have had vacuums put on or made arrangements?

A. Yes, but if they had put them on they would have killed those wells before we got them back.

The Court: They would have forfeited the leases if they hadn't.

Mr. Linebaugh: Those are facts, we know, but she didn't.

The Court: Yes, but it was her business to go to her counsel. If you are going to have such clap-trap as that, then no contract is sacred.

Q. What, if anything, did Mr. Pitt tell you would be the effect of placing vacuums upon the wells?

Mr. Davidson: We object to all this.

The Court: I am going to let them put it in and hold against them.

A. They said it would suck all the oil out of the ground. He said if we don't the other companies will get the oil.

The Court: That is no false statement. That is a fact. She had her rights. If they failed to produce the oil she could go and have it cancelled.

Q. Mrs. Weldy, at that time were you having any difficulty with reference to your bond as guardian?

A. Well, I was under surety bond which was costing me quite a bit.

Q. What statements, if any, with regard to your bond did Mr. Pitt or Mr. Anderson make to you during the period of these negotiations for the change of the terms?

Mr. Davidson: We object to that.

The Court: I sustain the objection. The Prairie Oil & Gas Company couldn't have had notice of such as that.

Mr. Pinson: The burden would be on the defendant to prove good faith.

The Court: No, not in that.

Mr. Linebaugh: We will offer to prove by this witness that during this negotiation Mr. Pitt and Mr. Anderson discussed with her the question of her bond and inability to continue it and avowed their willingness to make her bond so that she could retain the guardianship for such amounts as would be necessary, providing she would consent to, accede to their request to sign the petition for the extension of the leases, and subsequently they did in fact make her bond——

The Court: Suppose they did?

Mr. Linebaugh: Becoming surety and that—that was—well, I am making an offer—and such bond with Anderson and Pitt as sureties was filed in the County Court of Tulsa County and was of record at the time of the purchase by The Prairie Oil & Gas Company.

The Court: Suppose they did go on her bond, what effect would that have? How could that constitute fraud?

Mr. Linebaugh: It would constitute fraud when taken with the other circumstances, it seems to us.

The Court: I exclude that evidence. She says she had difficulty with her bond and they said they would help her make it. What is wrong about that?

Mr. Linebaugh: They are using that as an inducement, saying we will agree to make your bond, providing you will do this for us.

The Court: No, I don't think that is competent.

Mr. Linebaugh: We except.

Q Mrs. Weldy——

The Court: I will see what she has to say. You say Mr. Pitt come to you about signing the petition?

A. Yes, sir.

The Court: What did he say to you?

A. Well, of course, he asked me if I wouldn't make a commercial lease, is what he called it; he didn't say anything about a transfer. I told him "Mr. Pitt, I don't care to, because while I am under the Departmental lease we have the protection of the Departme::t." He says, "You have the protection of the whole state under a commercial." I says that wouldn't be much when I had it; no, I don't feel like making that. He made the remark: "You have always done the best for your children in every way." He says, "Do you think by refusing this offer that you are still doing right by your children?" And he says, "Do you think that the court will think that you are doing right?" Of course, I studied about it, and I told him I didn't know what the court would think. He says: "You know there have been a good many guardian seekers' eyes on your minors all the time." And of course when he made that remark it throwed a kind of fear over me that they might try to take the guardianship away from me. That is one of the things that caused me——

The Court: Never mind. What else was said?

A. I don't remember every detail. I told him I didn't like to accept it, but of course I did. He went up and got the papers.

The Court: He told you he would give $18,000.00 for a new lease; is that what he said?

A. For a commercial lease.

The Court: Well, that would be a new lease. Then you signed this application, a copy of which has been offered here?

A. Yes, sir.

The Court: Go ahead.

Q. What statements, if any, did he make to you with reference to the value of the property?

The Court: Don't make suggestions.

A. Well, I told him I didn't think it was enough. He says, "Sure it is enough; it is really more than the leases are worth." And that is when he come over it again. He says, "Do you suppose that the court will think that you are still doing the best for your children if you refuse that?" And that is about all of it that I can remember.

Q. Did you subsequently, after filing the petition, go to the County Court room in Tulsa?

A. Yes, sir.

Q. Who, if any person, accompanied you?

A. Mr. Pitt come and taken me in his car.

Q. Was anyone with Mr. Pitt, or did just the two of you go?

A. I won't be positive, but there was no one went up to the court house with us; I think the other parties were already there.

Q. What other parties?

A. There was one attorney there and I don't know whether it was Rice or Lyons because I was not acquainted with them at the time.

Q. When you got to the court room what happened?

A. Well, Mr. Pitt taken the papers up to the judge.

The Court: You mean he had the papers with him?

A. He had papers with him.

The Court: Why, the petition you filed was in court, wasn't it?

A. He went up and talked to the judge a few minutes.

Mr. Linebaugh: This was on the day of the confirmation, your honor.

The Court: Yes, but the petition she signed would be a part of the court files.

Q. Were you ever in the County Court room concerning this matter except this one time?

A. No, sir.

The Court: You were there when they had the hearing and the judge determined to permit you to make a commercial lease; were you present then?

A. I think the papers were signed at my own house and taken up by them.

The Court: They had been signed but on the day of the hearing you appeared in court and the court granted you authority to make a new lease?

A. It was all done at the same time.

The Court: That was the time you appeared before the court, wasn't it?

A. Yes, sir.

The Court: Judge Ramsey?

A. Yes, sir; Judge Ramsey.

The Court: And Judge Ramsey talked to you about that?

A. Very little. He asked me if I thought I was doing for the best interest of my wards. I told him I did, owing to the conditions surrounding. He said, "I am satisfied that you are; you always have done such." And he says, "I, in my own mind, think it is best." And that is about all that occurred in the court room that day.

Q. Had you signed the papers at that time?

The Court: When did you sign the new lease, there in the court that day?

A. I won't be positive whether I signed it there. I know we went on up to their attorney's office and there was some papers signed there.

Q. Was there any evidence taken in the court room, that

is, were any witnesses sworn and their testimony taken?

A. No, sir.

Q. Were you sworn and your testimony taken or just these questions asked you at the judge's bench; was there any auction sale conducted in the court room?

A. No, sir, not while I was there.

The Court: Well, do you know whether there was any other evidence taken before the judge?

A. There were none taken while I was there. There were no questions asked anyone else while I was there.

Q. Did the judge sign the order while you were standing at his bench there?

A. Well, the judge signed the papers right there.

Q. While you were standing at the desk?

A. Yes, sir.

Q. And then you think you went up to Rice & Lyon's office?

A. Yes, sir.

Q. And possibly signed some papers up there?

A. I know I signed something, some papers.

Q. Now, was there any auction sale while you were standing there at the judge's desk?

A. No, sir.

Q. Or any bidding while you were in the court room?

A. No, sir; there was nothing said to that effect.

Q. Nobody asked if anybody wanted to bid?

A. No, sir.

Q. How long were you in the court room altogether?

A. Well, we wasn't there very long. Of course, there were one or two parties ahead of us to see the judge and we had to wait until they were through. I don't think we were in there over thirty minutes at the outside.

Q. After the judge signed the paper at his desk how long did you remain in the court room?

A. Just a few minutes.

Q. Who went out with you?

A. Mr. Pitt and the two attorneys.

Q. Was that the only time you were up in the County Court room concerning the sale of this commercial lease, as you term it, or extension lease?

A. It was.

Q. Now, had you any conversation with your son, Albert T., with regard to the guardianship?

A. Yes, sir; we talked it over several times.

Q. Before you signed the petition?

A. Yes, sir.

Q. What statements, if any, did he make to you——

The Court: Never mind about that. Do you object to that?

Mr. Davidson: Yes, sir, we object to all this.

The Court: I sustain the objection to that.

Mr. Linebaugh: Will the court permit me to finish my question so as to make my offer?

The Court: No, that is not the rule in the Federal Court.

Mr. Linebaugh: I will ask it this way, if I may, your honor:

Q. Did your son, Albert T., tell you of certain statements which Mr. Pitt had made to him concerning your guardianship?

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: We except.

Q. Mrs. Weldy, the $18,000.00 offer which Mr. Pitt made, what was that for?

A. Well, it was for the making of a commercial lease, he said.

Q. On what properties?

A. On the W. G., Albert T., Jesse L. and Edward C.

Q. That was four separate allotments, were they?

A. Yes, sir.

The Court: He said he would pay as much as $18,000.00 for a commercial lease on these allotments; that is what he meant by an offer, isn't it?

A. Yes, sir.

Q. Now, who, if you know, made—if there was any division of that $18,000.00 made as applying to each of the separate allotments, who made it?

Mr. Davidson: If the court please, we object to that.

The Court: Yes, I sustain the objection. The record shows what was done.

Q. Who, if any person—well, I will ask you this: Prior to the petition being brought to you for your signature by Mr. Pitt, was the method of division and amount of the division of the $18,000.00 discussed and agreed upon between you and Mr. Pitt?

Mr. Davidson: We object to that; wholly incompetent.

The Court: I sustain the objection.

Q. Was any separate price ever suggested by Mr. Pitt or agreed upon between the two of you as to the separate allotments?

A. No, sir.

Mr. Davidson: We object to that.

The Court: I sustain the objection.

Mr. Linebaugh: Exception. That is all.

Cross Examination by Mr. Davidson.

Q. You say you had no lawyer?

A. I didn't have anyone representing me at that time.

Q. Did you have a man named Robertie?

A. I didn't at that time.

Q. You didn't go to see him?

A. No, sir.

Q. You didn't go to see him?

A. No, sir.

Q. He was your attorney?

A. Yes, sir.

Q. Didn't you employ L. J. Martin?

A. Not in this.

Q. Didn't L. J. Martin go up to the court with you the time Judge Ramsey had this hearing?

A. If he did, I do not remember it.

Q. You never employed Mr. Martin?

A. Mr. Martin did do work for me.

Q. When, after that or before that?

A. Well, before and some a er that. He made the final reports for the two children when they became of age.

Q. Do you say now you didn't go with Robertie or Martin?

A. No, sir.

Q. You didn't go to any attorney at all?

A. Mr. Pitt came down and we had the talk and he said it won't be necessary for you to pay any attorney fee.

Mr. Linebaugh: Won't you let her complete her answer?

The Court: I excluded that because it is not responsive to the question.

Q. You signed this petition and swore to it, didn't you?

A. Yes, sir.

Q. Over six years ago?

A. Well, it was when the lease was being made.

Q. And there has been nothing to prevent your coming to court with this matter within the last six years?

A. The children, when they became of age, took it up.

Q. But you still represent three minor children?

A. I do.

Q. You have an interest in William G. Twist's land as his widow?

A. I have a third interest.

Q. And you are getting your share of the one-eighth royalty from that lease?

A. Yes, sir.

Q. And have been all the time?

A. Yes, sir.

Q. And you have filed no suit for yourself?

A. I have filed no suit.

Mr. Davidson: I believe that is all.

Redirect Examination by Mr. Linebaugh.

Q. Mrs. Weldy, why didn't you get an attorney in these proceedings?

A. Well, I don't know, only just I didn't, and Mr. Pitt said he didn't think it would be necessary, they would take care of that.

The Court: He told you that he had an attorney?

A. He didn't come right out and say that; he just said they would take care of that.

The Court: Said they would have the papers fixed up?

A. Yes, sir.

Recross Examination by Mr. Davidson.

Q. There was an agreement there wasn't there that this royalty was to be increased from 10% to 12½%?

A. There was.

Q. And that was part of the consideration?

A. Yes, sir.

Q. And ever since that time an eighth royalty has been paid?

A. Yes, sir.

The Court: How long before the fifteen-year lease had expired when this agreement was made?

Mr. Linebaugh: About two years, your honor. (R. 44-53.)

The court did not by its decree affirmatively find that there was no fraud but it did unequivocally state its conclusions upon the subject in ruling upon the evidence introduced, or offered to be introduced by the plaintiffs.

The assignments of error, as the Circuit Court of Appeals said, disclose that the claim is made by petitioners that the court erred *(1)* in admitting evidence, *(2)* in excluding evidence, *(3)* in refusing to enter judgments for plaintiffs, *(4)* in making findings not supported by the evidence, *(5)* in refusing to make other findings.

The only exceptions to the rulings of the court on the admissibility of evidence was in two instances, namely: they offered to prove by Mrs. Weldy that during the negotiations between her and Los Angeles Cherokee Oil Company for the extension of the lease, Mr. Pitt and Mr. Anderson, its representatives, avowed their willingness to become sureties on her bond as guardian if she would sign a petition to the court for an extension of the lease (R. 47), and

the refusal of the court to permit Mrs. Weldy to testify as to conversations she had with her son, Albert T. Twist, with regard to the guardianship prior to the time she signed the petition for an extension of the leases (R. 50, 51). The assignments of error do not go to these specific rulings.

The argument in support of the claim of fraud is substantially: that Pitt and Anderson, the representatives of Los Angeles-Cherokee Oil Company, became Mrs. Weldy's bondsmen in Mrs. Weldy's guardianship case for the purpose of influencing her decision to petition the County Court to approve the extension of the leases; that they stated to her that the amount proposed to be paid was more than the leases were worth, and that she would not be doing right to reject the offer, and that the County Court would not look favorably upon such refusal on her part, and that she was led to fear that the County Court might remove her and place the affairs of her children in the hands of strangers. All this is urged in support of the allegation that the extension of the leases was procured by the "fraud, duress and false dealing of Los Angeles Cherokee Oil Company."

It is not necessary to argue here that this does not amount to fraud or duress, even if Mrs. Weldy was the sole judge of the expediency of extending the term of these leases. So far as her rights as the widow of William G. Twist are concerned, she is making no complaint, and has instituted no suit in her own behalf. As to the rights of her wards the probate court is the tribunal to determine whether it was for their best interests to have the terms of these leases extended. That court could have made such an order upon the petition of the lessees even if the guardian had refused to file a petition for that purpose, if it was con-

vinced that such extension was for the best interests of the ward. The Oklahoma statute gives the probate court having the appointment of a guardian "exclusive jurisdiction to control him in the management and disposition of the person and property of his ward." (Section 6583, Compiled Laws, 1921.) No fraud is alleged, or attempted to be proven, as having been perpetrated upon the court. As we have seen, the expediency of extending the leases was submitted to the probate court having jurisdiction of the guardianship of the minor lessors, and the court approved such extension. These suits, so far as they are based upon fraud in procuring the extension, are a collateral attack upon the judgment and order of the probate court.

By her petition filed in the probate court Mrs. Weldy, as guardian, represented that the original leases were made for a definite period, without proper regard for the best interests of the lessor and lessee. She set out the condition of the leases, the amount of oil being produced from each lease, the amount of oil accruing to the lessors, to-wit, ten per cent of the oil produced, and that Los Angeles Cherokee Oil Company had offered to increase the royalty from ten per cent to twelve and one-half per cent, and to pay to her for the benefit of herself and her wards, as their interests in the land may appear, an agreed sum of money, and praying that she be permitted to enter into an agreement to extend the term of each of said leases for a period so long as oil or gas shall be found therein (R. 10, 11). There is no intimation that any of the statements in that petition were untrue. The order of the probate court, pursuant to the notice and hearing, recites, as we have already shown, that the court heard evidence and found and approved the consideration for such extensions, and that the proposition was bene-

ficial and for the best interests of the minors. We must assume, in this suit, that the probate court performed its full duty and made such investigation as it deemed proper and necessary in order to determine whether the consideration was adequate and whether the extensions of these leases was for the best interests of the wards. Its orders and judgment in the premises cannot be collaterally impeached. There is no allegation or intimation that the Los Angles Cherokee Oil Company did not perform the conditions of the extensions approved by the court, or that the bonus money was not paid, or that the royalties were not increased, or that the wells were not drilled.

Petitioners indulge in many fine-drawn criticisms of the proceedings, which criticisms appear to be rather an afterthought, and not the basis of attack upon the transaction by the pleadings. They complain that the $18,000 was prorated according to the production of the different tracts, and that this was an arbitrary agreement without regard to the value of the extensions and could not determine their value, and say that such an arrangement does not take into consideration the number of wells on each tract, the age and condition of each well, and the extent of the undeveloped acreage on each tract. But there is no evidence as to the proper method of determining the value of the rights acquired by Los Angeles Cherokee Oil Company. So far as the proof is concerned, the parties, and the probate court, may have taken into consideration the very data suggested by petitioner. The fact that a lump sum of $18,000 was offered as a bonus, instead of so much for each extension, is no evidence of fraud or unfair dealing. In effect the Los Angeles Cherokee Oil Company made a bid of so much for each extension according to the basis of di

vision agreed upon, aggregating $18,000.00, and which was approved by the court.

Petitioners also claim that the bonus of $18,000.00 was the sole consideration. But this is not true, and indeed it may have been the least important. One of the motives inducing the sale may have been the fact that if the leases had not been extended the lessee could remove its equipment, for, of course, it could not have been compelled to sell that equipment to any other lessee. The removal of such equipment, it is obvious, would injure the wells on the land, possibly irreparably. An extension of the lease to the same operator would obviate that danger. The discrepancy between the bonus paid for the extension and the price later paid for an assignment of the extended leases by Los Angeles-Cherokee Oil Company to The Prairie Oil & Gas Company, if material at all, can be explained by the circumstance that The Prairie Oil & Gas Company bought the whole property, including the lessee's equipment, which, of course, could not have been taken into consideration in estimating the value of the extension. The value of a lease with the operating equipment in place and being used, is one thing; the value of the same lease, dismantled of its operating equipment, is quite a different thing. Certainly The Prairie Oil & Gas Company had the right to assume that the probate court, in approving the extensions, had determined the adequacy of the consideration. Surely it was not bound to inquire whether fraud had been practiced on the court in obtaining its judgment. One's estimate of the oil still recoverable from the land is a matter of speculation at best; the probability of new oil sands, which may be indicated by the drilling of new wells, either on the leased tract or upon adjoining land, different or improved methods of extraction;

the skill and experience of the operator; and, it may be, greater economy in management, wider knowledge of markets, and better marketing facilities, are all to be taken into account in arriving at the price which the purchaser is willing to pay for a producing lease. Indeed there are too many elements to be considered in determining the prospective value of an oil and gas mining property at a given time—fluctuating as such values must necessarily be—to make the mere fact of a discrepancy between a price paid to a land owner for an extension of the fixed term of an existing lease, and that paid eight months later for the whole interest and estate of the lessee, any criterion whatever on the question of fraud based on inadequacy of consideration. The argument as to the comparative amount of production, and the current market price of oil, at the two periods, is too narrow in its scope and is wholly insufficient as a predicate for the cancellation of these extended leases on the ground of fraud. As this court has said in *The Atlantic Delaine Company* v. *James*, 94 U. S. 207:

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear."

In *Maxwell Land Grant Case*, 121 U. S. 381, this court said:

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct written instrument for fraud or a mistake in the execution of the written instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and it cannot be done upon

a bare preponderance of the evidence which leaves the issue in doubt."

The court further said:

"If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the Government of the United States under its official seal."

And so we say in this case that the doctrine is all the more applicable to an attempt to cancel a completed contract, approved and confirmed by a court which had complete jurisdiction of the subject matter and the parties involved.

Counsel say that the agreement to drill an additional well on each of the leases, within six months, was no consideration because that was an agreement to do that which they were already bound to do. In this they are mistaken. The lessee in an oil and gas lease is bound, within the time prescribed in the lease, to drill at least one well, and that is because of his duty to explore the land by such means. But upon the discovery of oil he is under no obligation to continue the drilling of other wells unless they would be profitable.

—*Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801;
Watchorn v. *Roxana Pet. Co.*, 5 Fed. (2d) 636.

The absolute promise to drill an additional well on each of these leases within six months, whether conditions then indicated a loss to the lease owner and a benefit only to the owner of the land, can hardly be said to be no consideration.

It is also said that the increase in royalty was "but another subterfuge and pretended consideration" because the leases were governed by the regulations of the Department of the Interior, and that such regulations prescribed that after May 1, 1908, the maximum rate of royalty shall be twelve and one-half per cent. But while these leases were under the jurisdiction and supervision of the Department of the Interior at the time they were originally executed, it is obvious that at the time of the proceedings in the probate court the Indian lessors and their allotments had been released from Departmental control, for, otherwise, it would have been necessary to have the Department approve the modification of the leases, and the extension of the terms, and no such claim is made.

Even if the allegations of the complaints and the proof offered in support of them amount to fraud, such fraud was intrinsic. It inhered in the judgment of the court. What the court had to determine was the necessity or expediency of the extensions; whether it would be for the best interests of the wards to have that done; and whether the offer made for the extensions of the leases was an adequate consideration for such privileges. The probate court determined these matters upon the hearing. They were necessarily the subject of its investigation. The judgment must be regarded as the deliberate act of the court. (*Weaver* v. *Van de Venter*, 19 S. W. 889.) That the guardian may have been induced to sign her petition, if that be true, by the promise of the lessee's representatives that they would become sureties on her bond, surely bears no resemblance to fraud. Their statement that the court might remove her if she did not consent to such extension, and that she did not need an attorney, are perfectly consistent with good

faith on their part, and the fraud must be such as to be utterly repugnant to honest intentions. (*Hardeman* v. *Donaghey*, 54 Sou. 172.) In any case these representations were not sufficient to vitiate the judgment, for the probate court determined that the guardian's action in the premises was the right and proper thing to do. A judgment can only be set aside for fraud when the proof of it is clear and convincing, and when the fraud is the basis of it, and but for which fraud it would not have been rendered.

Holton v. *Davis*, 108 Fed. 138;
Doughty v. *Doughty*, 27 N. J. Eq. 315;
Boyden v. *Reed*, 55 Ill. 458;
Ely-Walker Dry Goods Co. v. *Smith*, 160 Pac. 898;
Ray v. *McKnight*, 183 Pac. 489;
Hardeman v. *Donaghey*, *supra*.

In *Scott* v. *Gypsy Oil Co.*, 239 Pac. 887, it was held by the Supreme Court of Oklahoma that the question of the inadequacy of the purchase price of a lease of a minor's lands was an issue involved in the course of the proceedings for the sale, and that the judgment of confirmation precludes inquiry into the subject in a collateral proceeding. The court in its opinion said:

> "This court, in numerous cases, has held that the sale of a minor's interest in real estate, the determination by the County Court of the necessity therefor, and the adequacy of the consideration, are conclusive in a collateral proceeding, in the absence of fraud extrinsic to the record, and are impervious to collateral attack, and the scope of inquiry in a collateral attack is confined to the consideration as to whether the County Court had jurisdiction of such proceedings. *Welch* v. *Focht*, 67 Okl. 275, 171 P. 730, L. R. A. 1918 D, 1163;

Tiger v. *Drumright*, *supra*. To the same effect: *Brown* v. *Trent*, 36 Okl. 239, 128 P. 895; *Bouling* v. *Merry*, 91 Okl. 176, 217 P. 404; *Crabtree* v. *Bath*, 102 Okl. 1, 225 P. 924."

In *Brooks* v. *Tucker*, 201 Pac. 645, the same court said in respect to the duty and power of a probate court in that state:

> "The law contemplates that the court must be satisfied from credible testimony adduced on the hearing of the return of the sale that the same has been conducted in accordance with the statutes and a fair value paid for the property, and the decree confirming the sale is a solemn judgment of the court vouching for the truthfulness of all of the essential facts necessary to constitute a valid sale. Purchasers in dealing with this class of land have a right to assume that the court has faithfully performed his duty."

In *Harrell* v. *Prairie Oil & Gas Company*, *supra*, the Circuit Court of Appeals said with reference to the sale of an extension of a lease claimed to have been given for a grossly inadequate price:

> "But conceding for the sake of argument that the lease was worth a great deal more than appellee's bid, that fact standing alone did not entitle appellant to a decree. The sale of the lease on June 19, 1916, was a judicial sale by a court having plenary jurisdiction over the parties and the subject-matter. *Crabtree* v. *Bath*, 102 Okl. 1, 225 P. 924; *Abraham* v. *Homer*, 102 Okl. 12, 226 P. 45; *Tucker* v. *Leonard*, 76 Okl. 16, 183 P. 807; *Thau* v. *Falls*, 136 U. S. 519, 548, 10 S. Ct. 1037, 34 L. ed. 531. That sale was confirmed by the court, and it is the established rule that after confirmation there can be no cancellation of the sale solely on the

ground that the price bid was inadequate. In *Morrison v. Barnette*, 154 F. 617, 624, 83 C. C. A. 391, 398, this court said:

> 'Hence the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids'."

V.

But respondent asserts by its answer that it is a bona fide purchaser. In its answer it alleges that at the time of its purchase of the assignment of these leases from the Los Angeles-Cherokee Oil Company on March 5, 1917, it paid to it more than a thousand dollars; that the consideration was bona fide and actually paid; that at the time of paying the consideration and at the time of the delivery thereof it had no notice or knowledge of the various transactions and representations alleged and set forth in the petition of the plaintiffs between its assignor and their guardian, and had no notice and knowledge of any proceeding and transactions relative to the modification and extension of said leases other than as shown by the records of the proceedings in the County Court of Tulsa County, Oklahoma, and avers that its purchase and the payment of the consideration was in reliance upon the apparent legal title of the Los Angeles-Cherokee Oil Company as shown by the public records. (R. 31.)

It was admitted on the trial that Dana H. Kelsey, who was unavoidably absent, would, if present, testify that he acted for the Prairie Oil & Gas Company, in connection with Fred S. Cook, and conducted the negotiations for the purchase from the Los Angeles Cherokee Oil Company of these Twist leases with other leases; that there was paid for them the following sums: For the William G. Twist lease, $112,561.61; for the Edward C. Twist lease, $49,377.38; that at the time of completing such purchase and paying the moneys and taking the assignments "he had no notice or knowledge of the transactions alleged by the petitions to have occurred and alleged to have taken place between the officers or agents of the Los Angeles Cherokee Oil Company and Leoria L. Twist (Mrs. Weldy), guardian, in connection with the agreement to extend the leases, but that he purchased these leases on behalf of the Prairie Oil & Gas Company subject to an examination of the abstracts furnished the Prairie Oil & Gas Company, and that in such transaction H. B. Anderson and a man by the name of Pitt represented the Los Angeles Cherokee Oil Company, and that neither of said persons referred to or informed him concerning any matters, conversations or transactions between the Los Angeles Cherokee Oil Company and its representatives and Leoria L. Twist Weldy." (R. 39-40.) Counsel criticise the stipulation as insufficient to support the plea of bona fide purchaser. They say that there is no evidence in the record that Fred S. Cook was unaware of the nature of the transactions or of the conversations between Pitt and Anderson and the guardian. But the stipulation was that Dana H. Kelsey was the representative of the Prairie Oil & Gas Company. What Fred S. Cook's connection was with that transaction, is not disclosed, and we

therefore cannot assume that even if he knew of these conversations and transactions his knowledge would bind the Prairie Oil & Gas Company. But the real criticism of counsel is that the known facts were sufficient notice that "some improper activities had existed" because the Prairie Oil & Gas Company knew that it was paying very much more than the $18,000.00 which had been paid for the extension of these leases seven or eight months before, and that therefore with this positive knowledge of the discrepancy in the prices paid it could not contend that it was in the exercise of good faith. We have already called attention to the fact that the price paid by the Prairie Oil & Gas Company to the Los Angeles Cherokee Oil Company was for the whole property, including the equipment and that such discrepancy is not a criterion for determining the existence of fraud. Furthermore, the probate court in approving the transaction necessarily determined the adequacy of the consideration. Was it the duty of the Prairie Oil & Gas Company to make inquiry whether fraud had been practiced on the court? As said in *Meehan* v. *Williams*, 48 Pa. St. 238, "what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell."

In *Wilson* v. *Ware*, 6 Wallace 83, this court said:

> "The question when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence."

This court also said in *Townsend* v. *Little*, 109 U. S. 54:

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 301 and 302.—October Term, 1926.

Edward C. Twist et al., Petitioners, vs. Prairie Oil & Gas Company.	On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[June 6, 1927.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases are here on writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. 270 U. S. 639, 640. That court had before it for review, on appeal and cross appeal, a final decree in equity of the District Court for eastern Oklahoma. The case had been heard by the trial court on the evidence as a suit in equity; and had been treated as such in both courts by both parties. The Court of Appeals concluded that the trial court did not have jurisdiction in equity; ruled, of its own motion, that the case must be deemed to have been tried below as one at law on an oral waiver of jury; and that, since there had been no waiver filed with the clerk as provided in § 649 of the Revised Statutes and no bill of exceptions or special findings of fact as provided in § 700, the appellate court could not consider the errors assigned by the parties. It, therefore, affirmed the judgment on the pleadings. 6 F. (2d) 347, 349. Whether the Court of Appeals erred in so ruling is the only question requiring decision.[1]

In 1917 the Prairie Oil and Gas Company acquired by assignment an oil and gas lease, together with an extension thereof, and entered into possession of the land covered thereby. The lessor was William G. Twist, a citizen of the Cherokee Nation to whom the land had been allotted. After Twist's death and the expiration of the original lease, his children brought this suit in a state court of

[1] In No. 302 four cases, each concerning a different lease, were consolidated. The facts stated in the opinion are those of one of these. The same question is presented in No. 301 concerning a fifth case.

Oklahoma seeking relief on the ground that the extension was invalid because of fraud and also because certain statutory requirements had not been observed. Two causes of action were therein set forth. In one, damages were sought as for an alleged trespass. In the other, it was charged that the purported extension of the lease constitutes a cloud upon plaintiffs' title; and the plaintiffs prayed for a declaration as to the ownership, for cancellation of the extension, for quieting of plaintiffs' title, and for an injunction against further trespass or claim by defendant. Such joinder in a single suit of a cause of action at law with one in equity is permissible under the Oklahoma statute; and under the state law a suit to quiet title may apparently be brought by one out of possession against one in possession. Compiled Oklahoma Statutes, 1921, c. 3, Article XIV.

The Company, the defendant below, removed the case to the federal court for eastern Oklahoma on the ground of diversity of citizenship. In the federal court the joinder of an action at law with one in equity is not allowable. *Hurt* v. *Hollingsworth*, 100 U. S. 100; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 651. Unless the first cause of action stated in the bill could have been construed as asking an accounting incidental to the equitable relief asked, the pleading should have been recast so as to separate the action at law from the suit in equity and each case should have proceeded separately according to its nature. Compare *Hatcher* v. *Hendrie & Bolthoff Mfg. & Supply Co.*, 133 Fed. 267, 271; *Knoxville* v. *Southern Paving Co.*, 220 Fed. 236, 238. Neither party sought to have this done. The defendant caused the case to be docketed as a case in equity; and filed a single answer to both causes of action. Therein, it objected that the petition did not state facts sufficient in law or in equity, to entitle the plaintiff to the relief prayed for, or to any relief; and then, taking up the several allegations of the petition, admitted some, denied others, and set up new matter. The answer prays that the petition be dismissed for want of equity; but also asks affirmative relief. It prays "that the court, by its decree, declare and determine that the defendant's title to said oil and gas lease, as modified and extended, is good, valid and subsisting as against the claim of the plaintiff, and that its title thereto be quieted as against said claims." A reply to the new matter was filed by plaintiffs.

The proceedings on the appeals were throughout those customary in an equity cause. The records were full and complete. They include, among other things, all of the evidence. The decree declared that the defendant is the owner of the extended oil and gas lease covering eleven-fifteenths interest in the described lands; that two of the plaintiffs are the owners of the remaining four-fifteenth interest; that these two plaintiffs recover four-fifteenths "of the net proceeds of the oil and gas produced from said land from September 29, 1919 to April 1, 1923" (the amount of which was agreed upon); and that "the amount produced since April 1st, 1923 [be] reserved for further consideration." Both the plaintiffs and the defendant appealed to the Circuit Court of Appeals. Neither party assigned as error that there was lack of jurisdiction in equity or a lack of equity. The errors assigned disclosed claims that the District Court erred in admitting evidence; in excluding evidence; in refusing to set aside the extension; in making certain findings; in making certain rulings; in decreeing that the defendant was the owner of the eleven-fifteenths interest in the extended lease; in decreeing that two of the plaintiffs were the owners of four-fifteenths; in concluding that the extension of the lease held by the defendant constituted a cloud upon the title of these two and in decreeing the removal of that cloud; in concluding that they were entitled to two-fifteenths of the net proceeds and in ordering payment of the agreed amount.

The Court of Appeals held that it was without power to review the case as upon an appeal from an equity cause, or to consider any of the errors assigned. Because in its opinion there was a plain, adequate and complete remedy at law, it held that the case must be deemed to have been tried in the District Court as an action at law without a jury. And it applied the rule, that where an action at law is tried without a jury and there has been no waiver of the jury in the manner prescribed by the statute and no special findings or bill of exceptions, the appellate court is without power to review any question except those which arise on the process, pleadings or judgment. See *Law* v. *United States*, 266 U. S. 494; *United States* v. *Archibald McNeil & Sons*, 267 U. S. 302; *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349, 356; *Cleveland* v. *Walsh Construction Co.*, 279 Fed. 57. The statutory rule limiting the scope of review by an appellate court

in jury-waived cases was not applicable to the case at bar. This is not an action at law.

In federal courts, as in others, a plaintiff has a right to choose whether he will seek to enforce a legal or an equitable cause of action and whether he will seek legal or equitable relief. He makes his election and proceeds at law or in equity at his peril. See *Perego* v. *Dodge*, 163 U. S. 160, 164. Formerly, if a plaintiff in a federal court sued in equity and the objection that there was a plain, adequate and complete remedy at law was sustained, the bill was necessarily dismissed. *Curriden* v. *Middleton*, 232 U. S. 633. And ordinarily the dismissal was required to be without prejudice to an action at law, *Horsburg* v. *Baker*, 1 Pet. 232, 237; *Thompson* v. *Railroad Companies*, 6 Wall. 134, 139; *Van Norden* v. *Morton*, 99 U. S. 378, 382; *Rogers* v. *Durant*, 106 U. S. 644; *Scott* v. *Neely*, 140 U. S. 106, 117; *Lacassagne* v. *Chapuis*, 144 U. S. 119, 126; though possibly such precaution was unnecessary. *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170. Now, under the Act of March 3, 1915, c. 90, § 274 a, 38 Stat. 956 and Equity Rules 22 and 23, if the suit was improperly brought in equity, either the trial court or the appellate court may transfer the case to the law side. Compare *Liberty Oil Co.* v. *Condon Bank*, 260 U. S. 235, 241-243; *Pierce* v. *National Bank of Commerce*, 268 Fed. 487, 489; *Equitable Trust Co.* v. *Denver & Rio Grande R. R. Co.*, 250 Fed. 327, 340. The practice is the same in suits removed from a state court, except that the suit is remanded to the state court where the equitable relief sought, although beyond the equitable jurisdiction of the federal court, may be granted by the state court. Compare *Cates* v. *Allen*, 149 U. S. 451; *Knoxville* v. *Southern Paving Co.*, 220 Fed. 236, 237.

The parties cannot, of course, compel the trial court to hear in equity a suit which seeks a legal remedy for a legal cause of action. *Lewis* v. *Cocks*, 23 Wall. 466. Nor can the task of reviewing such a case as if it were actually an equity cause be imposed upon the appellate court through consent of the parties. See *Elkhart Carriage & Motor Car Co.* v. *Partin*, 9 F. (2d) 393. Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction. Compare *Reynes* v. *Dumont*, 130 U. S. 354, 395. But that objection, whether taken

in the trial court or in the appellate court, does not go to the power of the court as a federal court.

The decree in the case at bar rests upon the second cause of action set forth in the bill and the answer thereto. We must disregard, as the lower court and the parties did, the first cause of action. The features of the second cause of action are all those of a bill to remove a cloud and to quiet title. The bill prays for a declaration of the rights of the respective parties; for the cancellation of an agreement; for an injunction against the assertion of certain rights; and for general relief. The answer embodied what is in effect a cross-bill. The relief sought by the bill and the cross-bill is of a character within the recognized sphere of federal equity jurisdiction. See *United States* v. *Wilson*, 118 U. S. 86. The recovery, as upon an accounting, of the agreed amount of the net profits was a normal incident of such a bill. *Clarke* v. *White*, 12 Pet. 178, 187-188; *Southern Pacific Co.* v. *United States*, 200 U. S. 341. Compare *The Salton Sea Cases*, 172 Fed. 792, 799-802; *Chicago, M. & St. P. Ry. Co.* v. *United States*, 218 Fed. 288, 301-302. It may be that the bill was fatally defective. But the proceeding was unmistakably a suit in equity. The plaintiffs attempted to state a cause of action cognizable by a court of equity. They sought equitable relief.

It is true that ordinarily one out of possession may not bring in a federal court a bill to quiet title, against one in possession, because there is a full, adequate and complete remedy at law and the defendant is entitled to a jury trial. See *Whitehead* v. *Shattuck*, 138 U. S. 146; *Black* v. *Johnson*, 177 U. S. 349, 363-364; *Lancaster* v. *Kathleen Oil Co.*, 241 U. S. 551, 555. But the suit is of a class within the jurisdiction — that is the power — of a federal court sitting in equity. There are cases in the federal courts in which suits in equity to quiet title brought by one out of possession against one in possession have been entertained, because of the special facts, or because of the particular relief sought, or because the defendant waived the objection of lack of equity jurisdiction. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417; *Schroeder* v. *Young*, 161 U. S. 334, 345. Compare *Stewart* v. *Masterson*, 131 U. S. 151; *Duignan* v. *United States*, 274 U. S. —; *Jones* v. *Prairie Oil & Gas Co.*, 273 U. S. —; *Kilgore* v. *Norman*, 119 Fed.

1006, aff'd 120 Fed. 1020; *Big Six Co.* v. *Mitchell*, 138 Fed. 279; *Continental Trust Co.* v. *Tallassee, etc. Co.*, 222 Fed. 694, 702. Such waiver is possible, because the objection that the bill does not make a case within the equity jurisdiction of a federal court goes not to the power of the court as a federal court, but to the merits. *Blythe* v. *Hinckley*, 173 U. S. 501; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500. Compare *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U. S. —; *Duignan* v. *United States*, 274 U. S. —.

The Court of Appeals, being of opinion that the plaintiffs had not established a right to relief in equity, because there was a plain, adequate and complete remedy at law, might, on the undisputed facts, have reversed the decree on that ground without considering the specific errors assigned; and, rightly or wrongly, it might have ordered the bill dismissed without prejudice to the remedy at law; or might conceivably have ordered the case transferred to the law docket; or might have considered the case on the merits as on an equity appeal, in the view that at such stage of the proceedings it was desirable to hold that the objection to the equity jurisdiction had been waived. Compare *Southern Pacific Co.* v. *United States*, 200 U. S. 341. But it could not, while refusing to consider the errors assigned, retain the case and adjudicate the merits. This it did when it affirmed the decree. It was error to declare that this proceeding, which is a bill in equity in its nature as well as in its form, and which seeks relief that only a court of equity can give, *Lancaster* v. *Kathleen Oil Co.*, 241 U. S. 551, 555, shall be deemed an action at law, because the only remedy open to the plaintiffs was at law. Compare *Spring Garden Insurance Co.* v. *Amusement Syndicate Co.*, 178 Fed. 519, 530. The suit at bar is not like *Elkhart Carriage & Motor Car Co.* v. *Partin*, 9 F. (2d) 393, an action at law masquerading as a suit in equity.

Because the Court of Appeals should have considered the errors assigned as in an equity cause but did not, we reverse its judgment and remand the case to it for further proceedings in accordance with this opinion. See *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 245.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.